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Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Appellant,

v.

STANDARD OIL COMPANY OF NEW JERSEY, A CORPORATION CREATED UNDER THE LAWS OF THE STATE OF DELAWARE,

Appellee.

BRIEF OF APPELLEE

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NO. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Appellant,

v.

STANDARD OIL COMPANY OF NEW JERSEY, A CORPORATION CREATED UNDER THE LAWS OF THE STATE OF DELAWARE,

Appellee.

BRIEF OF APPELLEE

I. Jurisdiction.

The question of equity jurisdiction is not raised in this Court. The jurisdictional propositions made by appellant here are:

(1) That the suit is prosecuted against the State of West Virginia in violation of the Eleventh Amendment to the Constitution of the United States, and

(2) That the constitutional questions raised are frivolous and unsubstantial, wherefore the statutory court of three judges was without jurisdiction.

The district court considered these questions in overruling the motion to dismiss.

II. Outline of the Case.

The case was submitted to the court on bill of complaint and exhibits (R. 1-67); motion of defendant to dismiss (R. 75); answer of defendant and exhibits (R. 76-118); amended bill of complaint (R. 125); amended answer (R. 126); and the stipulation of facts taken in lieu of formal evidence and exhibits (R. 139-238).

This is the first chain store tax case before this Court in which the constitutional attack is based primarily upon a factual record of gross inequalities in tax treatment. While the facts are stipulated by the parties, the court below made specific findings of those facts which it regarded as of special importance (R. 276-286). There is no dispute as to any material fact, but the parties differ as to the conclusions to be drawn therefrom.

In his brief, appellant has recited many of the facts agreed upon, but with no attempt to marshal them into significant groupings. At the risk of some repetition, therefore, attention is directed to certain facts and classes of facts, arranged so as to disclose to the Court the significance which they carry in this case.

A. WHAT THE APPLICATIONS FOR LICENSES UNDER THE STATUTE SHOW.

Applications for licenses for the year 1933 were filed by 11,348 operators of 15,210 "stores". The total tax paid by these applicants was $569,693, including the amounts

paid under protest. Of the applicants, 10,722 operated one "store" each. Of these, 2,000 were operators of service stations. Only seven taxpayers operated more than 75 "stores" and were liable for the maximum tax of $250 per "store". There were no taxpayers in the class from fifty to seventy-five "stores", and but two in the class from thirty to fifty, these being operators of service stations.

Of the seven in the highest bracket, two operated ordinary store chains, namely, the Great Atlantic & Pacific Tea Company and the Kroger Grocery & Baking Company. The other five were service station operators as follows:

	"Stores"	"Store" tax
Standard Oil Company of New Jersey	1003	$240,173.50
Gulf Refining Company	779	184,061.50
Pure Oil Company	151	26,747.50
Ashland Refining Company	95	12,719.50
Sinclair Refining Company	94	12,469.00
	2122	$476,171.00

Approximately 2,072 applicants for license were in the service station business. Seventy-two of these applicants were operators of more than one service station with a total of 2,453 stations. The total "store" tax paid on behalf of the 2,453 stations was $481,168, or 84.46% of the tax collected under the statute. The five service station operators named above paid an average tax of $224.40 per station and a total of 83.5% of all taxes paid under the statute. The appellee alone paid 42.16% of the total tax receipts. The remaining 2,067 operators of service stations paid $9,997, or 1.8% of all the taxes collected. The 67 operators of multiple service stations (other than the five named) paid an average tax of $15.09 per station.

The sales of all commodities from "stores" in 1932 totaled $328,562,161. Of this amount $20,356,638 (6.2%) represented sales from service stations. (R. 141-145.)

B. DESCRIPTION OF APPELLEE'S BUSINESS IN WEST VIRGINIA.

The tax commissioner accurately states that the company is a refiner and distributor of petroleum products, as distinguished from a producer or transporter of such products. However, he omits any description of the manner in which the business is conducted. As one of the company's contentions is that the Act has no application to service stations and bulk plants, particular attention is directed to the character of the business done at these places and the manner in which it is conducted. Service station operation, R. 152; bulk plant operation, R. 152-162; leased stations and vending privilege stations, R. 167-169.

C. EARNINGS FROM APPELLEE'S STATIONS.

A detailed analysis of the appellee's earnings is made later in this brief. We here correct certain implications of appellant's brief as to the significance of those figures.

Appellant argues that the business of the appellee is a part of a comprehensive integrated industry in which the appellee is a "mere subsidiary", that the profit and loss accounting between appellee and its affiliates is made "practically at will," and that, to determine the relation of the present tax to earnings, effect must be given to all intercorporate relations between the appellee and other subsidiaries of the parent company in this country and abroad.

This position is not tenable. The tax is imposed upon the marketing units and an inquiry into the earnings of the producing and transporting companies is shown to be irrelevant. The record shows the prices at which petroleum products of the company are billed from the refinery to the marketing department. They approximate closely the current refinery billing price in the area (R. 177; Graph, R. 206). The reasonableness of the billing prices is amply supported by the following record:

First: Loss of the affiliated producing company which supplies crude oil to the Parkersburg refinery. (R. 208-209).

Second: Profit statement of two affiliated pipe line companies transporting petroleum to Parkersburg refinery. (R. 209.)

Third: Estimated statement of profits of affiliated company which supplied tires to West Virginia service stations. (R. 209.)

It is the specific finding of the court below (R. 284) that the stipulated facts make it possible to decide whether the figures taken from appellee's books, and shown in the stipulation, correctly state the actual profits or losses of the business done at its stations in West Virginia, and the court concludes:

> "We conclude from these stipulations that the figures, relating to the profits and losses of the gasoline and oil stations of the company, may be relied on as truly representing the results of the company's marketing transactions in the state." (R. 285.)

The stipulation (R. 211) includes a letter from counsel for the appellant asking for separate profit and loss statements from all the affiliated and subsidiary companies of the "Standard Oil Group" for the years 1930-1933, also a letter from the chief counsel of the appellee (R. 212) declining to give profit and loss statements of the affiliated companies operating in other parts of the world on the ground that such information would "add nothing of value" to the present suit.

D. BUSINESS DONE BY OTHER SERVICE STATION OPERATORS WITHIN HIGHEST TAX BRACKET.

The stipulation (R. 215-224) includes the operating statements of the Pure Oil Company, Gulf Refining Company, Ashland Refining Company and Sinclair Refining Company, so far as available for each company during the period 1931-1933. The books of these companies showed losses in the marketing branch during these years. These companies employed various methods in billing gasoline and oils from their refineries to their marketing departments, but all the statements show that if the billing prices are adjusted to the actual current price in the area (National Petroleum News quotation), the marketing losses are increased, rather than decreased. Appellant refuses to accept these operating statements (except Ashland Refining Company) on the ground that they do not reflect the operations of producing and transporting affiliates.

Appellee included the statements of these corporations to show that its earnings compare favorably with those of other operators of large numbers of service stations, thus negativing any inference that the absence of greater earnings may be attributable to inefficient or improvident management.

E. OPERATORS OF SINGLE STATIONS.

Two thousand persons operate single stations without any form of agency or license agreement or exclusive sales arrangement with distributing companies. They purchase petroleum products from appellee and other distributors.

The statute (if applicable) lays a tax of $2.50 on these individual operators and an average tax of $240.00 on the stations of the appellee. Appellee's bill of complaint (R. 22-27) and the facts stipulated at pages 173-174 of the record support the view that:

(a) The organization of appellee's system of stations does not interfere with or tend to eliminate the business of the single station operators. (SOPER, R. 259; CHESNUT, R. 267).

(b) In so far as the advantages of chain store organization inhere in the business of distributing petroleum products, appellee and similar companies share them with the single stations handling their products, and

(c) Single stations and multiple stations are operated in substantially the same way and subject to the same essential economic factors.

For these reasons appellee contends that the tax treatment accorded to it under the statute is palpably arbitrary and unrelated to any reasonable ground of difference between it and the operators of single stations.

F. GROUPS OF COMPETITIVE STATIONS.

The record (pp. 233-237) contains a brief analysis of the gross gallonage and earnings at a number of groups of service stations operated by various companies; also sales

data upon a number of the appellee's agency stations, as well as stations operated by individuals. In the original record photographs of these stations were shown.

These exhibits show (a) the relatively small business done by the typical agency station, (b) that many individual dealers paying a tax of $2.50 do a larger volume of business than stations for which the appellee is charged an average of $240, and (c) competitive groups (R. 235-237) of stations of the same general type situated in close proximity to each other, often on opposite corners. These show graphically the discriminatory effect of the "store" tax on similar stations in the same vicinity, operated by different companies under similar conditions.

G. COMMODITY STORE CHAINS.

The stipulation (R. 195-196) contains a list of large merchandising chains doing business in West Virginia, the number of stores operated by each in the state, the gross revenue therefrom, and the store tax for which they are liable under the Act. Similar figures are given in detail as to the appellee (R. 205), and generally as to all operators of service stations.

The net earnings of the appellee's stations, and of the stations of the four other companies operating more than 75 stations in the state (so far as available), are given in the record. It is shown that the relationship of the "store" tax to gross revenue in the case of multiple service stations is "in no way comparable" with the similar ratio in the case of general commodity chains. (SOPER, R. 255.)

On the basis of these data the district court noted certain significant characteristics of chain store operation and service station operation, particularly as to numbers of units and gross revenue, and concluded that the Act, when applied to both types of business, results in a gross inequality, leaving commodity store chains practically untouched, but saddling a burden on the operators of multiple service stations "out of all proportion to the value of the privilege enjoyed" by them. (SOPER, R. 260.)

III. Summary of Argument.

A. THE DISTRICT COURT PROPERLY OVERRULED THE MOTION OF APPELLANT TO DISMISS THE BILL.

1. THE SUIT IS NOT A SUIT PROSECUTED AGAINST THE STATE OF WEST VIRGINIA.

Ex parte Young, 209 U. S. 123.
Smyth v. Ames, 169 U. S. 466.
Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 390.
United States v. Cordy, 58 F. (2d) 1013.

2. THE APPELLANT'S APPLICATION OF THE ACT RAISES SUBSTANTIAL QUESTIONS UNDER THE CONSTITUTION OF THE UNITED STATES.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527.
Liggett v. Lee, 288 U. S. 517.

B. THE APPLICATION OF HOUSE BILL NO. 112 TO THE APPELLEE'S SERVICE STATIONS VIOLATES THE EQUAL PROTECTION GUARANTY OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

1. THE VALIDITY OF THE APPELLANT'S APPLICATION OF THE ACT IS TO BE DETERMINED FROM ITS PRACTICAL EFFECT UPON THE BUSINESS OF OPERATING SERVICE STATIONS IN THE STATE.

Panhandle Oil Co. v. Mississippi, 277 U. S. 218.
Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389.
Wagner v. City of Covington, 251 U. S. 95.
Bandini Petroleum Co. v. Superior Court, 284 U. S. 8.
Kehrer v. Stewart, 197 U. S. 60, 69.

2. THE APPLICATION OF THE ACT TO SERVICE STATIONS IS AN IMPOSITION OF PALPABLY ARBITRARY AND DISCRIMINATORY RATES OF TAXATION WITHOUT RATIONAL RELATIONSHIP TO THE VALUE OF THE PRIVILEGE SUBJECTED TO THE TAX.

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Airway Electric Appliance Co. v. Day, 266 U. S. 71.
Ohio Oil Co. v. Conway, 281 U. S. 146.
Royster Guano Co. v. Virginia, 253 U. S. 412.
Quaker City Cab Co. v. Penna., 277 U. S. 389.
South Carolina Power Co. v. Tax Commission, 52 F. (2d) 515, *aff'd*, 288 U. S. 178.
Milwaukee v. Lee, 49 F. (2d) 274, *aff'd*, 284 U. S. 590.
Fiscal Court v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296.
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79.
Liggett v. Lee, 288 U. S. 517.
Southern Grocery Stores v. Tax Commission, 55 F. (2d) 931.
Heiner v. Donnan, 285 U. S. 312, 329.

C. THE APPELLANT'S APPLICATION OF THE ACT PRODUCES A DISCRIMINATION SO ARBITRARY AND CAPRICIOUS AS TO AMOUNT TO THE CONFISCATION OF THE APPELLEE'S PROPERTY AND BUSINESS WITHOUT DUE PROCESS OF LAW.

Tyler v. United States, 281 U. S. 497.
Towne v. McElligott, 274 Fed. 960.
Brushaber v. Union Pac. Ry. Co., 240 U. S. 1, 24.
Henderson Bridge Co. v. Henderson City, 173 U. S. 592.
Nichols v. Coolidge, 274 U. S. 531.
Heiner v. Donnan, 285 U. S. 312.
Ft. Smith Lumber Co. v. Arkansas, 251 U. S. 532.

D. HOUSE BILL NO. 112 HAS NO APPLICATION TO THE SERVICE STATIONS AND BULK PLANTS OF THE APPELLEE.

Wadhams Oil Co. v. State, 210 Wis. 448, 245 N. W. 646, on rehearing, 210 Wis. 457, 246 N. W. 687.

City and County of San Francisco v. Larsen, 165 Cal. 179, 131 Pac. 366.

State v. Hanchette, 88 Kan. 864, 129 Pac. 1184.

Evening Journal Assn. v. State Board of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114.

State v. Wilson, 47 N. H. 101, 104.

LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (2d. ed.) sec. 390.

BLACK, INTERPRETATION OF LAWS (1896 ed.) pp. 198-199.

Midwestern Petroleum Corp. v. State Board, (Ind. S. Ct. dissent on rehearing) 191 N. E. 153, 154.

Fisk Rubber Co. v. Henson Auto Co., 168 Ark. 418, 270 S. W. 705.

Cesar v. Virgin, 207 Ala. 148, 92 So. 406.

Swanson v. DeVine, 49 Utah 1, 160 Pac. 872.

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Kelleher v. French, 22 F. (2d) 341, 346.

State v. Harden, 62 W. Va. 313, 330, 349, 350, 58 S. E. 715.

United States v. Trans-Missouri Freight Ass'n., 166 U. S. 290, 317, 318.

State v. Lancashire Ins. Co., 66 Ark. 466, 51 S. W. 633.

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Murdock v. City of Memphis, 20 Wall. (U. S.) 590, 618.

Gould v. Gould, 245 U. S. 151, 153.
Old Colony RR. Co. v. Com'r., 284 U. S. 552.
Alyea-Nichols Co. v. U. S., 12 F. (2d) 998.
Fry v. Ronceverte, 93 W. Va. 388, 394, 117 S. E. 140.
25 R. C. L. p. 1081.
59 C. J. p. 1131.
Gulf Refining Co. v. Chattanooga, 136 Tenn. 305, 190 S. W. 463.
Piedmont Oil Co. v. Kennedy, 165 Tenn. 375, 54 S. W. (2d) 958.
Williams v. Riley, 280 U. S. 78.
Central Transfer Co. v. Commercial Oil Co., 45 F. (2d) 400, 402.
United States v. LaFranca, 282 U. S. 568, 574.
United States v. Jin Fuey Moy, 241 U. S. 394, 401.

IV. Argument.

A. THE DISTRICT COURT PROPERLY OVERRULED THE MOTION OF APPELLANT TO DISMISS THE BILL.

1. THE SUIT IS TO ENJOIN THE PAYMENT INTO THE TREASURY OF A LICENSE TAX UNLAWFULLY COLLECTED BY THE TAX COMMISSIONER AND IS, THEREFORE, NOT A SUIT PROSECUTED AGAINST THE STATE OF WEST VIRGINIA.

It has long been settled by this Court that where the threatened action of a state officer is a violation of the personal or property rights of the complainant, the officer cannot plead immunity from suit on the ground that such a proceeding is a suit or action against the state. This is true where the statute under which the officer proposes to act is itself in violation of the Federal Constitution. *Ex parte Young*, 209 U. S. 123; *Smyth v. Ames*, 169 U. S. 466. It is equally true where the threatened act involves a wrongful administration of a constitutional statute. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390; *United States v. Cordy* (D. C. D. Md.) 58 F. (2d) 1013.

2. THE INTERPRETATION AND APPLICATION OF THE ACT BY THE TAX COMMISSIONER RAISES SUBSTANTIAL QUESTIONS UNDER THE CONSTITUTION OF THE UNITED STATES.

Appellee asked for, and insisted upon, an interlocutory injunction, grounding its complaint in part upon the unconstitutionality of the chain store statute. The relief sought, and the ground alleged therefor, required the calling together of a court of three judges. U. S. C., Title 28, sec. 380. But appellant contends that the constitutional ques-

tions are not substantial and, therefore, that an essential requisite to the jurisdiction of a court so composed is lacking.

The denial of equal protection of the laws and the violation of due process of law are the constitutional questions involved in this case. The district court held that the question of equal protection was not merely substantial but determinative.

The bill of complaint alleged the essential facts upon which this holding of the court finally rested. The flagrant and unwarranted discrimination between the operators of many service stations and the operators of a small number of stations or single stations, the arbitrary discrimination between the operators of multiple service stations and the operators of commodity store chains, and the practical singling out of the service station industry to carry the burden of the tax were all alleged in the bill and abundantly supported by the proof.

Appellant's contention is that every question here raised was previously decided in the Indiana, Florida and North Carolina chain store tax cases, notwithstanding the fact that *all five* of the distributing companies subject here to the maximum tax rate of $250 could have operated the same number of stations in *each* of the three states of Indiana, North Carolina and Florida for less license taxes than the appellee alone has been required to pay in West Virginia. This is illustrated in the following table:

TABLE NO. 1

COMPARISON OF IMPOSITIONS UNDER STATUTES APPROVED BY THIS COURT

Name of Company	No. Outlets	Indiana* (Jackson) $25 Maximum	North** Carolina (Maxwell) $50 Tax	Florida*** (Liggett) $40 Maximum	West Virginia $250 Maximum
Sinclair Refining Co.	94	$ 2,215.00	$ 4,650.00	$ 2,327.00	$ 12,469.00
Ashland Refining Co.....	95	2,240.50	4,700.00	2,367.50	12,719.50
Pure Oil Company.....	151	3,668.50	7,500.00	4,635.50	26,747.50
Gulf Refining Co.....	779	19,682.50	38,900.00	30,069.50	184,061.50
Standard Oil Co.....1003		25,394.50	50,100.00	39,141.50	240,173.50
TOTAL.....		$53,201.00	$105,850.00	$78,541.00	$476,171.00

*Acts Indiana (1929) ch. 207, p. 693.

**Public Laws, North Carolina (1929) ch. 345, sec. 163.

***The county line feature of the Florida law, which carried the maximum flat rate to $50 per unit, was disapproved by the Supreme Court. The statute also imposed a tax of $3 for every $1,000 of value of stock carried in each "store", which is disregarded in the above computation. Gen. Laws, Florida, Extra. Sess. (1931) ch. 15624, No. 24.

(a) The Difference Between this Case and the Case of Jackson v. State Board of Tax Commissioners, and Other Chain Store Cases.

It is pertinent to point out wherein the case of *Jackson v. State Board of Tax Commissioners*, 283 U. S. 527, does not render frivolous and unsubstantial the questions raised by appellee. That case decided that chain store operators and independent store merchants may be classified separately for purposes of taxation, *because* there are factual advantages in chain store operation which *distinguish* chain stores from independently-operated stores and from voluntary cooperative associations of independently operated stores. It was held that these *distinguishing advantages* justified a separate classification and a progressively graduated tax upon the group of chain store operators, based upon the number of store-units and rising to a maximum of $25 per unit. This Court pointed out in that decision that the statute treated "upon a similar basis all owners of chain stores similarly

situated." This was said apparently because the same unit measurement for the tax was applied to the entire group of chain store operators, and because, when compared to the situation of the independently-operated store, it could not be said that a progression up to $25 per store did not roughly and reasonably relate to the value of the privilege of operating a chain of stores and of adding stores to the chain. The Court, in its consideration of the *Jackson* case, did not have before it a tax which was either arbitrarily oppressive, *or which palpably and unreasonably discriminated between members of the chain store class.*

The Court held that a difference in fact may justify a difference in the tax, and recognized that there must be some correlation, albeit a rough and ready correlation, between the difference in fact and the difference in the tax. The difference in fact which the Court found was present was the advantage of operation through chain store methods and it was this advantage which justified the difference in tax treatment. But, when the tax treatment so far exceeds the advantage secured through chain store operation that any one must recognize that the treatment bears no relation to the advantage, then the tax ignores the difference in fact and bears no reasonable relation to the purpose of the statute.

Unwarranted Difference in Treatment of Single-Station and Multiple Station Operators

The West Virginia Act is presumptively valid as to typical store chains, such as grocery-store chains and drug-store chains, until the contrary is demonstrated by a "factual foundation of record." The appellee has presented the fact-

ual foundation as to its business, and as to the business of service stations generally, in this record. This factual background shows prominently that the establishment of the distributing companies' systems of service stations have not resulted in the elimination of single station operators. (SOPER, R. 259; CHESNUT, R. 267.) On the contrary, the record shows a determined purpose on the part of the companies to encourage and aid individual dealers. It shows also that the very nature of the business and the demands of the public require numerous small stations conveniently located. Chain store advantages are not the moving cause for the addition of new units. Indeed, the record shows that large numbers of stations are "accompanied by diminishing rather than increasing returns." (SOPER, R. 254-255.)

In the *Jackson* case the grocery store chain involved did not do a wholesale business. At every point in its activity, it was wholly antagonistic to, and competitive with, independent retail stores engaged in the same business. The appellee distributes petroleum products at wholesale and retail. Its products are available at company-owned stations, agency stations, and singly-operated stations (many of which latter type handle several leading brands). The single-unit dealer, handling appellee's products, has the cooperation of appellee's entire organization and the benefit of its business experience in meeting the competition of chain service stations handling other brands. Individual operators handling brands in competition with appellee's stations have similar cooperation from the distributors from whom they purchase. The appellee's mode of operation does not distinguish its stations from singly-operated stations. The "ultimate fact of common knowledge" (in the *Jackson* case) that the conduct of a chain of stores is a

form of merchandising quite apart from single-store merchandising has no counterpart in the service station business. The knowledge common to all persons familiar with the industry is that there is no essential economic advantage or opportunity in the service station business which is not shared by the single station operators. Consequently, the basis of the classification which was found in the *Jackson* and *Liggett* cases is not present here, and the differential between $250 and $2 in this Act, when applied to service station operation, does not even roughly measure any differences in fact between the single station and the multiple-operated station. The general legal principles governing classification announced in prior cases do not control the problem here presented. The *Jackson* case is not conclusive. It does not foreclose the question raised by appellee in this respect.

Unreasonable Discrimination Within the Chain Organization Class

The tax measure here is a chain store tax. It must operate, therefore, with at least a rough equality of burden, upon the class of chain organizations affected. If it fails to do this, and imposes an exceedingly onerous burden on one type of chain organization while permitting others to continue to operate practically untouched, then the tax measure is palpably discriminatory between members of the class created.

Service station systems characteristically have more units and much smaller average gross revenue per unit than ordinary store chains. Service stations pay all the taxes paid by the commodity store, and some special heavy burdens besides. While the appellant has always disparaged the contrast so drawn it is no accident that service station operators

will bear the brunt of this tax measure. The system of operating service stations through agents or licensed dealers is general throughout the country. It is especially applicable to a highly specialized and, therefore, comparatively simplified type of business. It inevitably will be true that a chain store tax measured according to number of units will fall with far greater force on the distribution of motor fuels and oils than on any other chain business. There are no chain organizations in West Virginia whose gross or net revenues are affected by the tax in anything like the same manner that it affects the five gasoline distributors in the $250 tax bracket.

The district court analyzed the prior cases on chain store legislation, and noting particularly (R. 255) that the "volume of business of oil companies does not increase in proportion to the number of stations maintained," said:

> "The graduated classification under the West Virginia statute rests only on the number of stores in the chain, and we have to consider whether this classification is reasonable when it appears that the practical effect thereof is to exact heavy taxes from a particular industry out of all proportion to the value of the privilege enjoyed. * * *
>
> "The Chain Store Tax cases in the Supreme Court did not involve a decision of the particular question with which we are now concerned, for the classification sustained therein did not rest merely upon numbers of stores." (R. 260-61.)

And, again (R. 264):

> "In short, since the amount of the tax is determined only by the number of stores, the addition of new stations, taxed at the highest rate fixed by the statute tends not to increase but to decrease the profits of the whole business; and the consequence is that

> as between members of the group composed of chain store organization, the differences, by which the gradations of the tax are fixed, rest solely upon ownership."

The district court recognized that the basis for sustaining this type of tax measure is an advantage in the chain mode of operation, not mere numbers. When the advantage secured through increase in the chain store organization is ignored as the basis for the tax, that is, when the increase in rates bears no relation to the value of the privilege of increase in number, then the only distinction is one of mere numbers.

That this Court in the *Jackson* case did not intend to create a precedent for every type of discriminatory chain store tax seems apparent from the case of *Liggett v. Lee*, invalidating the provision which increased the tax when units located beyond county lines were added to the chain organization. As the *Liggett* case is understood, the Court holds that there must be some relation between the tax and the *value of the privilege* of adding a store or stores to an existing chain. (288 U .S. 517, 534.) The *Jackson* case is not authority, we think, for a chain store tax in which "preference and repression go so far as to outrun the bounds of reason." (MR. JUSTICE CARDOZO, *Liggett v. Lee.*)

Upon a review of all these circumstances, JUDGE SOPER, speaking for the district court, said (R. 264):

> "In the present case, the highest rate of tax is $250 per store, and the total amount of the tax in every instance is fixed solely by the number of units without any reference to the amount of business done or profit gained. There results, as the evidence shows, the imposition upon one kind of chain organ-

> ization of a heavy burden of taxation which has no reasonable relation to the advantages conferred; for other businesses, enjoying all of the benefits of chain organization, and receiving a much greater revenue, pay a much smaller tax. So it must be said, when the practical effect of the statute is considered, that the sub-division of chain organizations into groups does not bear a fair and substantial relation to the object of the legislature; that all members of the class of chain organizations, similarly situated, are not taxed alike, and that the equal protection of the law guaranteed by the Fourteenth Amendment is denied."

The record of earnings does not *per se* establish the value of the privilege of adding units to a chain, and the district court by no means confined its consideration to that factor. Nevertheless, earnings are an important factor in determining the value of such privilege and one which can not be ignored.

Notable distinctions between service station systems and ordinary store chains consist in the difference in number of units per chain and in average gross revenue per unit. Appellant's application of the Act ignores these distinctions and reverses the relationship, placing a prohibitive tax on service station units and practically no tax on highly productive chain store units. Nothing in the *Jackson* case or in any case cited by appellant, forecloses the consideration of such facts.

These points are the basis of the more extended argument on the merits of the constitutional question of discrimination. It seems sufficient now to say that appellant can not properly term "trivial" and "unsubstantial" the very issues which all the members of the statutory court agreed were of sufficient gravity to control their decree.

B. THE APPLICATION OF HOUSE BILL NO. 112 TO THE APPELLEE'S SERVICE STATIONS VIOLATES THE EQUAL PROTECTION GUARANTY OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

1. Outline of Points Relied Upon by Appellant.

In various parts of the argument in support of his application of the statute to service stations, the tax commissioner contends for certain definite propositions. An outline of the answers to these propositions may clarify the issues before this Court.

(a) He contends that the legislative right to classify forecloses any question as to the validity of the graduated rates. (Brief, 26.) The company asserts that an academic discussion of classification without consideration of the rates and the graduation of the rates is an argument in *vacuo*. It is clearly impossible to decide as to the validity of the differentiation of subjects into classes, without giving consideration to the treatment which is to be predicated upon such classification and the practical effect of such treatment. The rates are the heart of a system of tax classification, and only upon consideration of such rates can it be determined whether such classification is rational and sound, or arbitrary and in violation of constitutional guaranties.

(b) He asserts that the legislature is the final judge of the rates and the graduation of the rates. (Brief, 35.) This proposition would withdraw from the judiciary the power to determine whether there has been arbitrary discrimination and denial of equal protection. The proposition that the Court may not consider the rates withdraws from judi-

cial consideration the very factor which renders the discrimination oppressive.

(c) He argues that even if the rates in the classification may be considered by the courts, the company has not shown the rates here involved to be confiscatory. (Brief, 38.) The ready answer to this is that confiscation is not an essential element of discrimination, but, answering the argument factually, the record does show that the tax attempted to be imposed confiscates the entire earnings of appellee's stations, and as to the other oil companies paying the highest rate, the tax is a capital levy.

(d) He leaves the definite impression that the company contends that it is not a "chain." (Brief, 27.) The company makes no such contention, and has never denied that it operates a system of service stations. It does contend, as the district court held, that the "combined characteristics" which feature typical chain store systems do not inhere in the operation of multiple service stations as compared with the operation of single stations. (CHESNUT, R. 268.)

(e) He asserts that the state may include all "stores" in a general class, or that it may sub-classify them into special kinds of "stores" (e. g. grocery stores, drug stores, etc.). He contends that here the state has chosen to adopt the broad classification. (Brief, 34.) Appellee does not deny the *power* of general classification. It does deny that service stations come within the category of "stores," and it contends that any broad classification and tax graduation which applies to service stations must bear some reasonable relation to the facts of the service station business.

(f) He urges that the classification and rates are related to the "purposes of the act," and that the purpose of the present Act was to lay a revenue tax on service stations. (Brief, 47.) The company does not challenge the power of the legislature to impose taxes on any business or privilege, but it specifically denies the right *to lay discriminatory burdens under the guise of a scheme of classification which bears no relation to the fundamental characteristics of the subjects of the classification.*

2. The Validity of the Appellant's Application of the Act is to be Determined from its Practical Effect Upon the Business of Operating Service Stations in the State.

(a) The Validity of a Taxing Statute is to be Determined from its Practical Operation and Effect.

The authorities are numerous and decisive that a tax measure is not to be viewed abstractly but that it must be tested in the light of its practical effect and operation. *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218; *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389; *Wagner v. City of Covington,* 251 U. S. 95; *Soper Opinion,* R. 263. Constitutional questions must be dealt with practically, not theoretically. *Bandini Petroleum Co. v. Superior Court,* 284 U. S. 8.

> "Taxes are very real things and statutes imposing them are estimated by practical results."
> *Nichols v. Coolidge,* 274 U. S. 531, 541.

These and many other cases establish the proposition that in determining the validity of tax legislation, it is of the

utmost importance to ascertain in what manner the tax affects the business or property against which it is laid. In this ascertainment, all form and artificiality in the legislation give way to substance and reality. *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 362; *Looney v. Crane Co.*, 245 U. S. 178, 189.

As a test of unconstitutionality, the necessary practical operation of a statute has the same controlling weight as a showing of deliberate design upon the part of the legislature to produce palpable inequality. In *County of Santa Clara v. So. Pac. Ry. Co.*, 18 Fed. 385, 398, MR. JUSTICE FIELD stated that a carefully devised scheme to produce inequality, *or a scheme, if not so devised, necessarily producing such result*, violates the Fourteenth Amendment.

A state tax law conflicts with the Fourteenth Amendment *when it proposes, or clearly results in*, flagrant and unwarranted inequality. *Dane v. Jackson*, 256 U. S. 589, 599; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 615; JUDSON, TAXATION (2d ed. 1917) p. 335.

Numerous state cases are hereinafter cited which show the controlling weight given by the courts to the necessary practical operation of a revenue measure. Finally, there is the statement in *Kehrer v. Stewart*, 197 U. S. 60, 69, that a discrimination resulting from the practical administration of a statute violates constitutional guaranties as much as one discriminatory upon its face. Whether or not the legislature so intended, the appellant's application of the Act to the business in which the appellee is engaged will inevitably produce gross inequality and destruction.

(b) The Practical Effect of the Act, as Administered, is to Single out the Business of Operating Service Stations, Already Heavily Burdened, as the Object of an Enormous Exaction.

While in form the tax imposed by this Act is an exaction upon the abstract privilege of operating multiple stores or units of a merchandising system, the substantial privilege which the appellee exercises is that of engaging in the distribution of petroleum products. The tax, if paid, must come from the proceeds of the business of operating service stations and outlets for gasoline and oils. The imposition of a special tax of almost a quarter of a million dollars upon the appellee alone, in addition to all other taxes and fees, as a condition of doing business, is not only an unequal and unconscionable exaction; it in effect is a destruction of a legitimate distributing organization and the valuable property rights devoted to that business. (CHESNUT, R. 270-271.)

It has been stated heretofore that the service station operators are called upon to pay 85.3% of the taxes collected under the statute, and that five companies, including the appellee, pay 83.5% of the total. The appellee alone pays approximately 2.7 times the amount collected from all taxpayers, exclusive of service stations, notwithstanding its revenue from sales in 1932 was not more than 2 per cent of the total sales of goods in the state.

If the interpretation placed upon the Act by the tax commissioner correctly reflects the legislative intent, the gasoline business, already heavily burdened with different forms of taxes, was singled out for additional exorbitant burdens,

and, with the exception of two grocery chains, a relatively inconsequential charge was imposed upon "stores" and "mercantile establishments" generally. The record shows that 9,276 taxpayers outside the gasoline business paid $83,-525. Deducting the amount paid under protest by the two grocery store chains, the record shows that the tax collected from 9,274 taxpayers was $32,535.

It is fair to test the discriminatory aspects of the tax by its effect upon the type of business which pays 85 per cent of the charge. For this reason the record has been made up so as to show the effect of the tax upon the service station business generally as well as upon the business of the appellee.

3. Analysis of the Record as to the Effect of the Statute Upon Operators of Service Stations.

Application of Tax to Stations of Appellee

Appellant takes the position that the appellee operates its service stations as part of a comprehensive system for the distribution of its products and that "the success or failure" of its business must be measured by the results of its entire system of operations. (Answer, R. 86.) The appellee denies the correctness of this view. The tax is not an imposition upon the company's general business or upon its properties. The Act is in terms applicable to "stores" in which goods, wares, or merchandise are sold. If applicable to the appellee, it is a tax upon the privilege of operating multiple stations or outlets at which petroleum products are sold. The reasonableness or unreasonableness of the charge must be determined by a study of the relationship of the tax to these several units and their operating results. It is en-

tirely irrelevant and immaterial whether appellee makes a large profit in the operation of the Parkersburg refinery (which it does not), or whether the companies with which it is affiliated make a profit from their production or transportation departments. The alleged integrated character of the oil business of the appellee is not involved here. Notwithstanding the heavy losses sustained in the operation of its refineries, the appellee furnished its refinery products to its marketing division at the current competitive prices, regardless of the cost.

The Act was passed in the year 1933, and sound authority compels the assumption that the legislature acted with reference to existing economic conditions. Furthermore, in so far as the reasonableness of the application of the tax to service stations is concerned, the state's revenue collections from distributors of motor fuels in West Virginia show that the year 1931 was the peak year of gasoline consumption, although the country was already well into the depression. They show further that the somewhat decreased consumption in 1932 was greater than that of the "good years" 1927-1929. See Table, R. 198. Therefore, the operating results of the appellee's business for 1931 and subsequent years afford a fair, as well as the only, test of the validity of the application of the statute to it. These operating results are summarized in the following table:

TABLE NO. 2

STANDARD OIL COMPANY OF NEW JERSEY

Summary of Sales and Net Earnings at all Stations in West Virginia for Calendar Years 1931, 1932, and First Six Months, 1933.

	1931	1932	6 Mos. 1933
Number Bulk Plants	78	63	54
Number Company and Agency Stations	911	1,046	949
Gallonage Petroleum Products	35,052,489.7	32,643,586.8	12,848,427.4
Revenue from Petroleum Products	$6,380,780.42	$6,093,701.68	$2,035,414.83
Revenue from Other Products	243,060.34*	166,495.16*	65,246.99*
Revenue from Services	81,502.82	58,816.12	23,920.60
Total Gross Revenue	$6,705,343.58	$6,319,012.96	$2,124,582.42
Average Gross Revenue per Station	7,360.42	6,041.12	2,238.76
Average Gross Revenue (bulk plants included)	6,779.92	5,697.94	2,118.23
Total Net Earnings	491,250.88	259,797.60	89,581.45**
Average Net Earnings per Station (bulk plants excluded)	539.24	248.37	94.31**
Chain Store tax computed on number of stations and bulk plants	236,666.50	266,726.50	240,173.50
Average Chain Store tax (computed)	239.29	240.51	119.71***
Percentage average "store" tax to average "gross"	3.5%	4.2%	5.6%

* Excluding sales of tires and other products to agency stations.
** Loss. Store tax not taken into account.
*** Six Months Only.

The figures in the foregoing table are impressive. The appellee's entire net earnings from service stations in the state for 1932 were only $259,797, or an average of $248.37 per unit. The computed chain store tax for 1932 would have absorbed the entire net profit for that year. The average net earnings at the 98 company-operated stations of the company in 1932 were $1,782.78, and for the first six months of 1933 there was an average loss of $379.50 at such stations. The stipulation (R. 151) shows that for the first eight months of 1933 the company earned a profit of $10,-314 at the company-owned stations which was converted into an average station loss of $48.64 by the application of the chain store tax.

The agency stations constitute the great majority of the outlets for gasoline and other petroleum products. Their possibilities for profit are definitely limited. While a number of these stations are substantial and well located, and do a comparatively large volume of business, the vast majority, particularly of the so-called vending-privilege type, yield at best very little net gain to the distributing company. The establishment of most of these vending-privilege outlets entails merely the placing of one or two gasoline pumps and a storage tank upon a small portion of the designated premises. The following tables (Nos. 3, 4 and 5) show the operating results at the appellee's agency stations for the years 1931 and 1932 and the first six months of 1933:

TABLE NO. 3 GROSS REVENUE AND NET EARNINGS TO APPELLEE FROM SALE OF PETROLEUM PRODUCTS AT LEASED OUTLETS AND VENDING PRIVILEGE OUTLETS (AGENCY STATIONS) GROUPED AND RANKED ACCORDING TO GALLONS OF MOTOR FUEL SOLD CALENDAR YEAR 1931

Group No.	Annual Gallonage Classification	No. Outlets In Group	Total Gross Revenue	Total Store Tax For Group	Total Net Earnings	Profit or Loss After Payment Store Tax		Gross Average Revenue Per Outlet By Groups	Average Store Tax Per Outlet	Average Net Earnings Per Outlet By Groups	Profit or Loss Per Outlet After Deducting Store Tax	
						Profit	Loss				Profit	Loss
1	0— 10,000	257	$ 239,429.43	$ 61,497.53	$ 9,237.96		$ 52,259.57	$ 931.63	$ 239.29	$ 35.95		$ 203.34
2	10— 20,000	201	502,230.07	48,097.29	21,354.81		26,742.48	2,498.65	239.29	106.24		133.05
3	20— 30,000	121	494,398.41	28,954.09	20,394.83		8,559.26	4,085.94	239.29	168.55		70.74
4	30— 40,000	79	455,126.74	18,903.91	18,991.80	87.89		5,761.09	239.29	240.40	1.11	
5	40— 50,000	55	404,427.76	13,160.95	16,319.84	3,158.89		7,353.23	239.29	296.72	57.43	
6	50— 60,000	33	298,911.60	7,896.57	12,391.86	4,495.29		9,057.92	239.29	375.51	136.22	
7	60— 75,000	27	301,721.00	6,460.83	12,781.46	6,320.63		11,174.85	239.29	473.38	234.09	
8	75—100,000	24	342,941.31	5,742.96	13,584.96	7,842.00		14,289.22	239.29	566.04	326.75	
9	over 100,000	18	401,402.96	4,307.22	16,633.36	12,326.14		22,300.16	239.29	924.07	684.78	
	TOTALS....815		$3,440,589.28	$195,021.35	$141,690.88	$34,230.84	87,561.31					
						Net Loss.....	$ 53,330.47					

			For 815 Outlets	Per Outlet
Average Gross Revenue Per Outlet 815 Outlets combined, 1931.....	$4,221.58	Chain Store Tax based on computed average for 989 Units in 1931.....	$195,021.35	$239.29
Average Net Earnings Per Outlet, 815 Outlets combined 1931.....	$ 173.85	Net Earnings	$141,690.88	173.85
		Payment of Chain Store Tax out of Capital.....	$ 53,330.47	$ 65.44

TABLE NO. 4 GROSS REVENUE AND NET EARNINGS TO APPELLEE FROM SALE OF PETROLEUM PRODUCTS AT LEASED OUTLETS AND VENDING PRIVILEGE OUTLETS (AGENCY STATIONS) GROUPED AND RANKED ACCORDING TO GALLONS OF MOTOR FUEL SOLD CALENDAR YEAR 1932

Group No.	Annual Gallonage Classification	No. Outlets in Group	Total Gross Revenue	Total Store Tax For Group	Total Net Earnings	Profit or Loss After Payment Store Tax		Average Gross Revenue Per Outlet By Groups	Average Store Tax Per Outlet	Average Net Earnings Per Outlet By Groups	Profit or Loss Per Outlet After Deducting Store Tax	
						Profit	Loss				Profit	Loss
1	0— 10,000	319	$ 307,080.18	$ 76,722.69	$ 4,384.00	$	$ 72,338.69	$ 962.63	$ 240.51	$ 13.74	$	$ 266.77
2	10— 20,000	247	637,075.07	59,405.97	12,672.63		46,733.34	2,579.25	240.51	51.30		189.21
3	20— 30,000	155	681,360.60	37,279.05	17,828.96		19,450.09	4,395.22	240.51	115.02		125.49
4	30— 40,000	96	586,096.07	23,088.96	15,016.10		8,072.86	6,105.16	240.51	156.42		84.09
5	40— 50,000	56	441,803.19	13,468.56	10,261.98		3,206.58	7,907.19	240.51	183.24		57.27
6	50— 60,000	22	211,534.59	5,291.22	3,007.07		2,284.15	9,615.20	240.51	136.68		103.83
7	60— 70,000	23	267,398.76	5,531.73	5,926.27	394.54		11,626.03	240.51	257.56	17.05	
8	70—100,000	16	236,816.12	3,848.16	4,217.99	369.83		14,801.00	240.51	263.62	23.11	
9	over 100,000	14	321,232.44	3,367.14	11,770.60	8,403.46		22,902.31	240.51	840.75	600.24	
	TOTALS....948		$3,690,397.02	$228,003.48	$85,085.60	$ 9,167.83	$152.085.71					
						Net Loss....	$142,917.88					

		For 948 Outlets	Per Outlet
Average Gross Revenue Per Outlet, 948 Outlets combined, 1932.....	$3,892.82	Chain Store Tax based on computed average tax for 1109 units in 1932.....	$228,003.48	$240.51
Average Net Earnings, Per Outlet, 948 Outlets combined, 1932.....	$ 89.75	Net Earnings	$ 85,085.60	89.75
		Payment of Chain Store Tax out of Capital	$142,917.88	$150.76

TABLE NO. 5 GROSS REVENUE AND NET LOSSES TO APPELLEE FROM SALE OF PETROLEUM PRODUCTS AT LEASED OUTLETS AND VENDING PRIVILEGE OUTLETS (AGENCY STATIONS) GROUPED AND RANKED ACCORDING TO GALLONS OF MOTOR FUEL SOLD FIRST SIX MONTHS 1933

Group No.	Annual Gallonage Classification	No. Outlets In Group	Total Gross Revenue For Group	Total Store Tax For Group	Total Net Operating Loss For Group	Profit or Loss After Payment Store Tax		Average Gross Revenue Per Outlet By Groups	Average Store Tax Per Outlet	Average Net Operating Loss Per Outlet By Groups	Profit or Loss Per Outlet After Deducting Store Tax	
						Profit	Loss				Profit	Loss
1	0— 10,000	585	$ 426,254.95	$ 70,033.28	$ 18,617.08		$ 88,650.36	$ 728.64	$ 119.72	$ 31.82		$151.54
2	10— 20,000	192	385,605.60	22,985.28	17,935.51		40,920.79	2,008.36	119.72	93.41		213.13
3	20— 30,000	45	154,443.59	5,387.18	7,232.26		12,619.44	3,432.08	119.72	160.71		280.43
4	30— 40,000	21	110,006.53	2,514.02	4,996.41		7,510.43	5,238.41	119.72	237.92		357.64
5	40— 50,000	5	31,984.82	598.58	1,465.87		2,064.45	6,396.96	119.72	293.17		412.89
6	50— 60,000	4	31,365.29	478.86	1,472.88		1,951.74	7,841.32	119.72	368.22		487.94
7	60— 75,000	2	17,801.78	239.43	835.66		1,075.09	8,900.89	119.72	417.83		537.55
8	75—100,000	1	13,209.25	119.72	612.08		731.80	13,209.25	119.72	602.08		721.80
9	Over 100,000	1	15,334.58	119.72	737.70		857.42	15,334.58	119.72	737.70		857.42
	TOTALS....	856	$1,186,006.39	$102.476.07	$ 53,905.45		$156,381.52					
					Net Loss.....		$156,381.52					

Average Gross Revenue Per Outlet, 856 Outlets combined, 1933..... $1,385.52

Average Net Operating Loss Per Outlet, 856 Outlets combined, 1933... $ 62.97

	For 856 Outlets	Per Outlet
Chain Store Tax Based on computed average tax for 1003 Units in 1933.....	$102,476.07	$119.72
Net Operating Loss.....	53,905.45	62.97
Total Loss After Payment of Chain Store Tax.....	$156,381.52	$182.69

The agency stations comprise approximately 85% of the total number of units upon which the appellee's tax for the year 1933 was computed. The three years embodied in the foregoing tables cover substantially the entire period of their operation. An analysis of the operating results at these many outlets for the three years shows the practical significance of the application of the statute to service stations.

In the peak year of gasoline consumption (1931) in West Virginia, the average gross revenue per agency outlet was $4,221.58, and the average net earnings but $173.85. A computation upon the basis of the number of units operated by the appellee in that year shows an average tax per unit of $239.29. In group 1, Table No. 3, consisting of 257 outlets, the average net gain was $35.95; in group 2, comprising 201 outlets, the average net gain was $106.24; in group 3, comprising 121 outlets, the average was $168.55.

Consider the data shown on Table No. 4 for the year 1932. The average gross revenue per outlet from the sale of petroleum products was only $3,892.82. A comparison of the computed average store tax of $240.51, based upon the number of bulk plants, service stations, and agency stations that the appellee had in operation in 1932, with its average net gain per agency outlet for that year, is in itself startling since the average net gain for these outlets in that year was but $89.75, scarcely more than one-third of the average tax per unit. There is no fact existent which will justify the imposition upon the appellee of an average tax for each of these outlets which is almost $150 greater than its average net earnings per outlet for the year.

In group 1, consisting of 319 outlets, the average net earnings were $13.74. In group 2, comprising 247 outlets,

the average net gain was $51.30, and in group 3, with 155 outlets, the average was $115.02. The average net gain for the 721 outlets in these three groups was $60.02, or about one-fourth of the average tax per unit. No amount of argument could accentuate the stark reality of these figures. In the next three groups, totaling 184 outlets, the average net gain per outlet for each group was measurably less than the average tax per outlet.

In group 7, the average net gain per outlet was $257.56, the highest net gain for any of these outlets was only $286.62, and the lowest $234.53. (Original Exhibit 3-a with stipulation.) Five of the 23 outlets in this group earned less than the computed average tax per outlet for that year. In group 8, the average net gain per outlet was $263.62, the highest net gain for any outlet of this group was $300.70, and the lowest $234.91. The net gain to the appellee from three of the 16 outlets in the group was less than the average tax per outlet. The 14 outlets in group 9 earned more than the average tax per outlet, but none of these outlets were of the vending-privilege type. In 1932 the average tax per unit would have exceeded the net earnings at 903 out of 948 agency stations, and would have approximated the average net earnings of $248.37 at both company-owned stations and agency stations for that year. Only seven of the appellee's 521 vending-privilege outlets earned as much as the computed average store tax per unit, and the result would be the same if the actual average store tax for 1933 were the basis of comparison. Even the most successful of these seven outlets earned only $280.28, and two of them barely earned the tax.

For the first six months of the year 1933, Table No. 5 shows an average net loss per outlet of $62.97 prior to the payment of the average store tax per unit. The average gross revenue per outlet for the period was $1,385.52. It is not probable that any outlet earned as much as the average tax of $239.43 per unit over the entire year.

The figures emphasize the fact that a system of graduated taxes based solely on numbers of units must inevitably impose a burden on service stations far greater than upon other lines of multiple unit business, and without any basis in fact upon which to predicate such excessive burden.

Stations of Five Companies Subject to the Maximum Rate of $250

It has been stated that the tax constitutes a prohibitive exaction upon all five distributing companies falling within the highest bracket of the tax. In point of fact, as to the four companies other than the appellee, the tax, upon the basis of 1932 operations, amounts to a substantial capital levy. The constitutional questions, therefore, may be judged either from the standpoint of the five companies as a group or of the appellee alone.

If the store tax had been operative in the year 1932 it would have been equivalent to approximately .8 of a cent per gallon (13.3% of the refinery billing price) on motor fuels sold at all the company-owned and agency stations of the appellee. At the 948 agency stations in operation during that year the tax would have averaged in excess of one cent per gallon, as compared with the .4 cent per gallon profit which such stations earned during the period. At

the 319 stations selling less than 10,000 gallons of motor fuel the tax would have exceeded 4 cents per gallon. At a number of the smallest stations the tax would have been as high as 15 cents per gallon on all gasoline sold.

All the distributing companies are in competition with each other. The tax of the Gulf Refining Company would have been equivalent to 1.2 cents per gallon (20% of the market price at the refineries). The tax on the Pure Oil Company would have been equivalent to .27 cent per gallon. On the Sinclair Refining Company and the Ashland Refining Company it would have been equivalent to .41 cent per gallon of motor fuels sold at their respective stations. It would not be possible for any of these companies to pass this tax directly to the consumer when other distributing companies having more than one station in the state pay an average tax per station of only $15.10. Reduced to cents per gallon of motor fuels sold, the tax paid by other distributing companies doing business in the state and operating few agency stations, such as The Texas Company, the Atlantic Refining Company, the American Oil Company, the Elk Refining Company, and the Sterling Oil Company, is so insignificant as to give them no cause for concern. The general public will not purchase its motor fuel requirements from the Gulf Refining Company at an increase of 1.2 cents per gallon, nor from the appellee at an increase of .8 cent per gallon, when other companies pay a tax so small that they can easily absorb it.

TABLE NO. 6 COMPARISON TAXES PAID BY SERVICE STATION OPERATORS, STATE OF WEST VIRGINIA, FISCAL YEAR ENDED JUNE 30, 1933

1	2	3	4	5	6	7	
Name of Operator	Gross Sales License Tax Refining of Petroleum Products.	Gross Sales License Tax Wholesale and Retail Dealing in Petroleum Products.	Gasoline Gallonage Tax	Number of Bulk Plants Service Stations, and Outlets Taxed Under Chain Store Act 1933.	Chain Store Tax 1933.	Average Chain Store Tax per Unit 1933.	
1. Standard Oil Company	$10,965.91	$ 2,197.48	$1,160,770.89x	1,003	$240,173.50	$239.45	1
2. Gulf Refining Company	—	1,844.93	653,072.92	779	184,061.50	236.28	2
3. Pure Oil Company	4,045.33	339.93	401,281.00	151	26,747.50	177.13	3
4. Ashland Refining Company	443.38	172.45	85,862.04	95	12,719.50	133.88	4
5. Sinclair Refining Company	—	49.84*	99,381.66	94	12,469.00	132.54	5
6. Bell Oil Products Company	—	385.28	10,554.96	40	1,692.00	42.30	6
7. South Penn Oil Company	429.56	773.88	44,093.64	31	787.50	25.08	7
8. American Oil Company	—	1,242.65	536,109.14	27	580.50	21.50	8
9. Viking Distributing Company	—	483.73	90,943.80	23	421.00	18.30	9
10. Elk Refining Company	3,213.91	—	181,440.36	22	403.00	18.31	10
11. Sterling Oil Company	—	863.27	22,942.40	20	332.00	16.60	11
12. Spears Bros., Inc.	—	678.84	67,631.32	9	66.50	7.37	12
13. The Texas Company	—	190.52*	163,036.06	9	66.50	7.37	13
14. Atlantic Refining Company	—	121.64	75,277.45	5	24.50	4.90	14
15. Dinsmoor & Company	—	—	2,246.68	4	19.00	4.75	15
16. Maynard's Service Stations	—	225.00	—	4	19.00	4.75	16
17. National Refining Company	—	7.80*	6,527.12	4	19.00	4.75	17
18. Freedom Oil Works Company	—	58.76	44,393.95	3	13.50	4.50	18
19. Shell Petroleum Corp.	—	74.01	25,259.28	3	13.50	4.50	19
20. Federal Oil Company	—	—	621.20	2	8.00	4.00	20
21. Southern Oil Company	5.13	134.94**	1,086.92	2	8.00	4.00	21
TOTAL	$19,103.22	$ 9,844.45	$3,672,532.79	2,330	$480,644.50		
GRAND TOTAL OIL INDUSTRY	$22,770.82	$12,225.18	$5,076,863.98	4,453	$486,168.00		

TABLE NO. 6 (continued)

COMPARISON TAXES PAID BY SERVICE STATION OPERATORS, STATE OF WEST VIRGINIA, FISCAL YEAR ENDED JUNE 30, 1933 (continued)

		8	9	10	11	12	13	14	15	
		Percentage of Tax Shown in Column 2 to Total Gross Sales Tax of $22,770.82 Paid by Refiners of Petroleum Products.	Percentage of Tax Shown in Column 3 to Total Gross Sales Tax of $12,225.18 Paid by all Wholesale and Retail Dealers in Petroleum Products.	Percentage of Taxed Units Shown in Column 5 to Total of 4,453 Bulk Plants, Service Stations, and Outlets.	Percentage of Tax Shown in Column 4 to Total Gasoline Gallonage Tax of $5,076,863.98 Paid in State.	Percentage of Tax Shown in Column 6 to Total Chain Store Tax of $486,168 Paid by Service Station Operators.	Ratio Gallonage Tax Percentage (11) to Chain Store Tax Percentage (12).	Percentage of Tax Shown in Column 6 to Total Collections of $569,693.06 Under Chain Store Act.	Chain Store Tax Shown in Column 6 Reduced to Cents per Gallon Motor Fuel on Basis of Gallonage Tax Column 4, at 4c per Gallon	
1.	Standard Oil Company	48.15	17.97	22.52	22.86	49.40	1 : 2.16	42.16	.83	1
2.	Gulf Refining Company	—	15.09	17.49	12.86	37.86	1 : 2.9	32.31	1.13	2
3.	Pure Oil Company	17.77	2.78	3.39	7.90	5.50	1.4 : 1	4.70	.27	3
4.	Ashland Refining Company	1.95	1.41	2.13	1.69	2.62	1 : 1.6	2.23	.59	4
5.	Sinclair Refining Company	—	.41*	2.11	1.96	2.56	1 : 1.3	2.19	.50	5
6.	Bell Oil Products Company	—	3.15	.90	.21	.35	1 : 1.7	.30	.64	6
7.	South Penn Oil Company	1.89	6.33	.70	.87	.16	5.4 : 1	.14	.07	7
8.	American Oil Company	—	10.16	.61	10.56	.12	88 : 1	.102	.004	8
9.	Viking Distributing Company	—	3.96	.52	1.79	.087	20.6 : 1	.074	.019	9
10.	Elk Refining Company	14.11	—	.49	3.57	.083	43 : 1	.0707	.009	10
11.	Sterling Oil Company	—	7.06	.45	.45	.068	6.6 : 1	.058	.058	11
12.	Spears Bros., Inc.	—	5.55	.20	1.33	.0137	92.1 : 1	.012	.004	12
13.	The Texas Company	—	1.56*	.20	3.21	.0137	234.3 : 1	.012	.002	13
14.	Atlantic Refining Company	—	.99	.11	1.48	.005	296 : 1	.004	.001	14
15.	Dinsmoor & Company	—	—	.09	.04	.0039	10 : 1	.0033	.034	15
16.	Maynard's Service Stations	—	1.84	.09	—	.0039	—	.0033	—	16
17.	National Refining Company	—	.06*	.09	.13	.0039	33.3 : 1	.0033	.012	17
18.	Freedom Oil Works Company	—	.48*	.07	.87	.0028	310.7 : 1	.0024	.001	18
19.	Shell Petroleum Corp.	—	.605	.07	.50	.0028	178.6 : 1	.0024	.002	19
20.	Federal Oil Company	—	—	.04	.01	.0016	6 : 1	.0014	.052	20
21.	Southern Oil Company	.02	1.10**	.04	.02	.0016	12 : 1	.0014	.029	21

x Standard Oil Company tax on gallonage sold at company stations and agency stations only. Total gallonage tax amounted to $1,739,346.04.

* Wholesale Tax Only.
**Retail Tax Only.

Application of the Tax to the Service Station Business in the State

The tax commissioner has furnished information as to various distributing companies whose petroleum products are handled in West Virginia through bulk plants, service stations, and agency or contract outlets, ranging in number from 2 to 1,003. (R. 199.) The list is a representative one for the purpose of making pertinent comparisons and of examining the effect of the application of the Act to operators of service stations and outlets for petroleum products. Table No. 6 shows the number of units upon which each listed company was taxed by the tax commissioner under the Act. It further shows the amount of such chain store taxes, the amount of business and occupation (gross sales) taxes, and the amount of gasoline gallonage taxes paid to the state. The figures are for the fiscal year ending June 30, 1933, as the period closest to the date of the passage of the Act.

Gross sales taxes and gasoline gallonage taxes afford two fair indices of the business done in the state by these companies. Consequently, in the case of each listed company a percentage is given expressing the relation between the number of units taxed to each company and the total number of service stations and outlets in the state (column 10), and percentages are also given showing the ratios of the amount of gross sales, gallonage, and chain store taxes paid by each company to the total of such taxes paid by all dealers in petroleum products (columns 9, 11, and 12, respectively).

The table shows that the appellee paid 17.97% of the total gross sales taxes paid by wholesale and retail dealers

in petroleum products, that it operated 22.52% of all the bulk plants, service stations and outlets in the state at the effective date of the Act, and that it sold through company-owned and agency stations 22.86% of all motor fuel gallonage handled therein as measured by gallonage taxes. On the other hand, the appellee paid $240,173.50 in chain store taxes, or 49.4% of the total of such taxes paid by service station operators. From the percentages shown in columns 11 and 12, and the ratios of such percentages, as shown in column 13, it appears that the appellee's share of the total chain store tax was 2.16 times its share of the gallonage tax. As to the other four companies operating more than 75 stations, the ratio of the percentage of store tax paid by each to the percentage of gallonage tax paid by each ranges from 1:1.4 in the case of the Pure Oil Company to 2.9:1 in the case of the Gulf Refining Company. These ratios should be considered together with some of the comparable figures applicable to the other distributing companies in the table, for example, the Atlantic Refining Company whose ratio is 1:296, the American Oil Company with a ratio of 1:88, and The Texas Company with a ratio of 1:234. If the ratios were based upon the gross sales tax percentages shown in column 9, they would be even more divergent.

The gross discrimination effected by applying this Act to service stations is further illustrated in column 15 where it is shown that, for the fiscal year 1933, the chain store tax of the appellee amounts to .83 cent per gallon of motor fuels sold through company-owned and agency stations. The Gulf tax is equivalent to 1.13 cents per gallon, the tax of the Pure Oil Company to .27 cent per gallon, the tax of the Ashland Refining Company to .59 cent per gallon, and

the tax for the Sinclair Refining Company to .5 cent per gallon. In contrast, the chain store taxes of the aforementioned Atlantic Refining, American Oil, and Texas companies are equivalent to .001, .004, and .002 cent per gallon, respectively.

This is the situation confronting the five highly taxed distributing companies. The comparison of these percentages is one basis for the appellee's contention that the taxation of service station operators, at steeply graduated rates upon the mere number of units, effects an arbitrary discrimination. The burdens cast upon the appellee and other operators of more than 75 service stations are far removed from any relevant facts in the service station business. They are vastly greater than those they would bear under a rational theory of classification.

A comparison of strictly competitive stations in the same neighborhood in the larger cities in the state has been made. There are a number of such illustrations in the record which further show the inequities in the operation of the statute, especially as to appellee. The motor fuel sales in gallonage, the gross revenue, and the average chain store tax at these competitive stations have been summarized in the following table:

(Table No. 7 Appears on Pages 46 & 47)

TABLE NO. 7 COMPARISON MOTOR FUEL GALLONAGE, GROSS REVENUE, AVERAGE CHAIN STORE TAX FOR SERVICE STATIONS GROUPED ACCORDING TO COMPETITIVE LOCATIONS (SEE PHOTOGRAPHS EXHIBIT 6, STIPULATION).

Group	Name of Company	Location	Motor Fuel Gallons Calendar Year 1932	Gross Revenue* Calendar Year 1932	Average Chain Store Tax Per Station 1933
	Standard Oil Company	Washington & Greenbrier Sts.	162,486	$32,400.00	$239.45
A	Viking Distributing Co.	Washington & Greenbrier Sts.	148,248	25,488.00	18.30
Charleston	American Oil Company	Washington near Greenbrier St.	218,905		21.50
B	Eastern Garage, Standard agency	Elizabeth St. near Jackson	51,153	8,600.54	239.45
Charleston	Elk Refining Company	Elizabeth & Jackson Streets	55,827	7,778.76	18.32
	Standard Oil Company	Midland Trail, Kanawha St.	198,704	37,194.00	239.45
C	Pure Oil Company	Midland Trail, Kanawha St.			177.13
Charleston	American Oil Company	Kanawha & Washington Streets	106,067	16,514.69	21.50
	Standard Oil Company	Cleveland & Locust Streets	145,521	27,736.00	239.45
D	American Oil Company	Jackson & Jefferson Streets	182,453	30,046.00	21.50
Fairmont	Freedom Oil Works Company	Jackson & Jefferson Streets	133,192		4.50

E Huntington	Standard Oil Company	3rd Ave. and 14th Street	112,340	19,457.00	239.45
	Elk Refining Company	3rd Ave. and 15th Street	75,766	11,418.00	18.32
	Gulf Refining Company	3rd Ave. and 15th Street	85,767	13,264.00	236.28
F Huntington	Standard Oil Company	5th Ave. and 31st Street	134,709	23,636.00	239.45
	Gulf Refining Company	5th Ave. and 31st Street	126,213	19,575.00	236.28
	South Penn Oil Company	5th Ave. and 31st Street	33,474	5,755.00	25.40
G Parkersburg	Standard Oil Company	6th, 7th and Ann Streets	177,959	29,636.00	239.45
	Gulf Refining Company	7th and Juliana Streets near Ann St.	95,696	12,876.00	236.28
	Pure Oil Company	7th and Juliana Sts.			177.13
	Sterling Oil Company	8th and Murdock Avenue	160,601	21,664.00	16.60
H Wheeling**	Standard Oil Company	Byrd Ave. and National Road	60,413	11,576.00	119.72
	American Oil Co., dealer	National Rd. near Byrd Ave.	39,431		10.75
	Sun Oil Co., dealer	National Rd. near Byrd Ave.	86,986		1.25
	Spears Bros., Inc.	National Rd. near Byrd Ave.	66,161	10,130.00	3.64
I Charleston	Park Your Car Co.				
	(a) Standard Agency	Dickinson St. near Lee St.	87,554	13,891.78	239.45
	(b) Ashland Agency	Lee St. near Dickinson St.	34,030	5,400.52	133.89
	Elk Refining Company	Dickinson St. near Lee St.	67,289	9,771.21	18.32

* Gross Revenue, excluding state and federal gallonage taxes. The figures for the Standard Oil Company stations include all gross revenue from petroleum products, accessories, and services.

** Figures for six months, 1933, only.

The stations in a given competitive group are operated by different distributing companies. They are located within a short distance of each other, usually upon the corners at the intersection of two streets. Their methods of operation are substantially the same. (R. 187-89.) They are similar in appearance. The volume of business at each of the stations is not materially different.

Yet, this study shows that the American Oil Company stations in groups A and D had larger gross gallonage than any of their direct competitors at the same locations and are subject to an average store tax of only $21.50 per station. The stations of other oil companies in these groups likewise bear nominal taxes, for example, $18.30 for a Viking Distributing Company station, $18.32 for an Elk Refining station, $16.60 for a Sterling Oil Company station, and $4.50 for a station of the Freedom Oil Works Company. The stations of the appellee, on the other hand, are assessed with an average tax of $239.45, although they handle petroleum products under comparable conditions. The appellee could not possibly increase its prices at these locations in an attempt to earn the tax. What is shown for these illustrative locations is true generally throughout the state. Gross discrimination is apparent. The saddling of prohibitive burdens upon a business is unwarranted when at the same time others in the same business operating similarly are very lightly taxed. The guaranty of equal protection of the laws here invoked is not an assurance that taxes will be imposed under all conditions and times which will enable all businesses and industries to operate profitably, but surely they give an assurance of equality of opportunity for those engaged in the same business under substantially similar conditions.

The Position of the Single Station Operator

In the field of service station operation all types of stations, including the individually-operated single station, enjoy substantially the same opportunities for business. That is the fact as to the distribution of appellee's petroleum products, and sufficient facts have been marshalled in the record with reference to other distributing companies to indicate that the conduct of the appellee's business is representative generally of both large and small distributing organizations. (R. 187-190.)

The conditions under which the singly-operated stations do business are similar in all essential particulars to those existing at the service stations of the appellee and of the other four companies subjected to the maximum rate of $250 per station. (R. 183.) Such stations handle the same grades of products, under the same distinctive brands, and, in practically all communities, at the same retail price. (R. 183, 185.) The appellee and similar companies furnish operators of single stations with advertising matter and vending equipment, and urge such dealers to take advantage of their marketing information, and promotional and sales aids. (R. 173.)

The relation of man-hours to gross revenue is approximately the same at all types of stations handling the appellee's products. The cost of utility service is a fairly constant factor at all stations. The benefit of any improvement in product and the benefit of advertising media is passed on to the operators of single stations as well as to other stations. (R. 184-5.) The company by its system of tank-wagon tickets and invoices supplies a uniform accounting system for such

dealers. (R. 161.) Group meetings, moving pictures, general salesmen, and expert supervisors aid in training the dealers to learn the operating methods prevailing at company stations. (R. 186.)

The distributing companies make some slight distinction in price to agency stations handling their products exclusively and to individual operators, but there is substantial uniformity in their price policies. The price policy of the appellee is representative. The gross margin of profit to the agency dealer consists of 2½ cents spread between wholesale and retail price and 1 cent per gallon rental, the agent usually being also the lessor. The spread between the wholesale and retail price at individually-operated single stations is shown to be 3 cents. The operations for the year 1932 show that the net profit of appellee on all petroleum products sold at agency stations was equivalent to .4 of a cent on each gallon of gasoline sold therefrom; a profit of .48 cents at individually-operated stations and 3.85 cents at company-owned stations. Out of the latter figure came the operating expenses and any return upon the investment in such stations.

The stipulation shows that the operators of one station or a small number of stations compete on even terms with the appellee, with whom they are in direct competition for retail trade. See figures as to Spears Brothers; Maynard Service Stations, Inc.; Defiance Service Station; J. A. Blake; Lane's Garage; Park Your Car Company. (R. 191-195.)

Multiple Service Stations and
Commodity Chain Stores Compared

It is characteristic of the gasoline distributing companies that they greatly exceed all other businesses in number of units, and the tax imposed by the act in question is sharply increased by number of "stores". At the 2,453 multiple-owned service stations, the gross sales in 1932 amounted to $15,198,638, or 4.6% of the gross sales of all "stores" in the state; whereas the operators of these stations paid 84.46% of all the chain store taxes assessable against "stores" in the state.

In the same year, 1,889 units of commodity chain stores, many of which are nation-wide in the scope of their activities, had gross sales of $75,454,257, or 22.9% of all gross sales in the state; while these same commodity chain stores were chargeable with only $60,785, or 10.7% of all "store" taxes which would have been assessed as of that year. *The "store" tax on the 2,453 multiple-owned service stations would exceed 3% of their gross revenue, while the commodity chain stores would pay less than 1/12 of 1%.* (R. 277.)

Table No. 8, based upon data in the record, shows the extent of the business done in the state by representative commodity store chains for the years 1931, 1932 and 1933.

TABLE NO. 8

VOLUME OF SALES—REPRESENTATIVE COMMODITY CHAINS

STATE OF WEST VIRGINIA

Name of Chain	1933			1932		1931	
	No. of Stores	Chain Store Tax	Average Chain Store Tax Per Store	Gross Revenue	Average Gross Revenue Per Store	Gross Revenue	Average Gross Revenue Per Store
Louis K. Liggett Co.	1	$ 2.50	$ 2.50	$ 97,619	$ 97,619	$ 106,538	$106,538
Whelan Drug Co.	1	2.50	2.50	93,312	93,312		
Kay Jewelry Co.	2	8.00	4.00	116.717	58,358	162,438	81,219
Sears, Roebuck & Co.	4	19.00	4.75	562,861	140,715	630,808	157,702
G. R. Kinney Co.	7	45.50	6.50	235,824	33,689	278,722	39,817
Montgomery, Ward & Co.	7	45.50	6.50	1,058,083	151,154	935,976	133,710
O. J. Morrison Stores	11	97.50	8.86	1,523,033	138,457	2,042,236	185,657
S. S. Kresge Co.	12	118.00	9.83	1,685,141	140,428	1,998,880	166,566
F. W. Woolworth Co.	21	367.50	17.50	1,778,671	84,698	2,203,859	104,945
Kroger Grocery & Baking Co.	94	12,469.00	132.64	5,499,343	58,503	6,099,555	63,718
Great A. & P. Tea Co.	198	38,521.00	194.55	12,455,017	62,400	14,260,559	72,023

The table contained in the findings of the district court (R. 278) compares certain commodity store chains with the business of the appellee. The following tabulation, based upon the figures for 1932 and the findings of fact by the court, relates the "store" tax to the gross earnings of the commodity chains and of the appellee:

TABLE NO. 9

RELATION OF "STORE" TAX TO GROSS REVENUE—REPRESENTATIVE COMMODITY STORE CHAINS — STANDARD OIL COMPANY OF NEW JERSEY.

CALENDAR YEAR 1932.

(Based on Record 196, 205)

	No. of "Stores"	Average Chain Store Tax Per "Store"	Average Gross Revenue Per "Store"	Per Cent of Gross Revenue
Whelan Drug Co.	1	$ 2.50	$ 93,312	1/384 of 1%
Louis K. Liggett Co.	1	2.50	97,619	1/400 of 1%
Kay Jewelry Co.	2	4.00	58,358	1/147 of 1%
Sears, Roebuck & Co.	4	4.75	140,715	1/296 of 1%
G. R. Kinney Co.	7	6.50	33,689	1/52 of 1%
Montgomery, Ward & Co.	7	6.50	151,154	1/232 of 1%
O. J. Morrison Stores	11	8.86	138,457	1/156 of 1%
S. S. Kresge Co.	12	9.83	140,428	1/142 of 1%
F. W. Woolworth Co.	21	17.50	84,698	1/50 of 1%
Kroger Groc. & Bak. Co.	94	132.64	58,503	1/4 of 1%
Great A. & P. Tea Co.	198	194.55	62,400	1/3 of 1%
Standard Oil Co.	1109*	240.51	5,697*	4.2%

* District Court's figures (R. 251, 278) excluded bulk plants in total stations and in average gross revenue.

The average gross revenue per station of the appellee for company-owned and agency stations, combined, was approximately $7,000 for the year 1931, and approximately $6,000 for the year 1932. The average gross earnings of the commodity chains above listed ranged from $33,689 to $151,-154 per store for the year 1932. Appellee's average chain store tax for the year 1932 would have been approximately

$240, or 4.2% of the gross revenue, whereas, the nationally known organization of Montgomery, Ward & Co., with an average gross revenue of $151,154 per store in that year would have paid an average tax of $6.50 per store, or 1/250 of 1% of the gross revenue for the year. While the average gross revenue per store of the Kroger Grocery & Baking Company was over nine times the average gross revenue of appellee's stations, the average "store" tax of the appellee was almost twice the average tax of $132.64 per store for the Kroger Company. The volume of business done by the Great Atlantic & Pacific organization in West Virginia during 1932 was practically twice the business of the appellee, but the former would have paid a tax of $38,521, while the appellee would have been charged in that year with at least $240,000, or more than six times the tax of the national chain. While the gross revenue of the above ten chain store organizations in West Virginia during 1932 was $24,962,309, or practically four times the gross revenue of the appellee from its 1109 service stations and bulk plants, the appellee, with a gross revenue of $6,319,012 for that year, would have been required to pay $266,726.50, whereas the total store tax of the ten companies listed above would have been $51,693.50. Further reference to the record shows that in 1932 the total gross revenue of all taxpayers now subject to the "store" tax was $328,562,161, while the gross sales of all gasoline dealers aggregated but $20,356,338.94, or 6.2% of the whole, yet the gasoline dealers are now required to pay approximately 6 times the amount of store taxes paid by all other taxpayers.

4. THE APPLICATION OF THE ACT TO SERVICE STATIONS IS AN IMPOSITION OF PALPABLY ARBITRARY AND DISCRIMINATORY RATES OF TAXATION WITHOUT RATIONAL RELATIONSHIP TO THE VALUE OF THE PRIVILEGE SUBJECTED TO THE TAX.

Appellee asserts that the discriminatory and arbitrary graduation of the rates, and the excessive amount of the tax in the highest bracket, imposes a burden upon it which is without any reasonable relationship to the factual differences between the business of operating multiple service stations and the business of operating a system of chain commodity stores. It asserts that the application of the Act effects a gross discrimination against the appellee and the four other oil companies operating more than 75 service stations in the state, and in favor of other refining and distributing companies operating smaller numbers of units. It further asserts that there is no factual difference between the operation of multiple stations and single stations to justify the wide difference in classification and tax treatment accorded by the statute.

Appellant in his answer replies that the classification is "well established in law and in fact." (R. 102.) He considers that the decision of this Court in the *Jackson* case forecloses any judicial inquiry as to the validity of any classification of business by the number of "stores", no matter what the nature of the business, the character or size of the "stores", the amount of the tax or the irregularities in the graduation.

Appellant further relies upon *Magnano v. Hamilton, Attorney General*, 78 L. ed. (Adv.) 712. That decision, as we understand it, sustains the view that different taxable

subjects (*e. g.*, oleomargarine and butter being distinct for that purpose) may be taxed at widely different amounts, or one such subject may be oppressively taxed and the other may not be taxed at all. This principle is not new, but it does not follow that members of the same class (chain organizations) may be taxed at such widely different and variant amounts that the difference in tax treatment bears no factual relationship to the difference in the taxable attributes of such members.

The district court, after reviewing the chain store tax cases, states the principle that, in measuring the amount of a chain store tax, it is not *per se* arbitrary or unreasonable to increase the tax on all stores in a chain when a new store is added. (R. 262.) But, having thus recognized the principle of chain store taxation, the court penetrates the issue by the question:

> "Does it follow that a classification of chain store organizations is reasonable which has regard merely to the number of units in a chain, no matter how disproportionate the burden may be in its practical effect when the tax is applied to different members of the group?" (SOPER, R. 262.)

Appellee understands that this Court has answered JUDGE SOPER'S question in *Louisville Gas Co. v. Coleman*, 277 U. S. 32, and in other cases, where it was said that classification for tax purposes "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

The *Louisville Gas Company* decision is a concrete case in which this Court invalidated a tax because of the *dispropor-*

tionate amount of the tax in the classification. The Court recognized the gross inequality in a 0.2% tax on five year mortgages, when mortgages of lesser duration were *entirely* exempt, and laid down the very proposition relied upon here that a smaller differential might have been reasonable and valid. It was stated that in fixing the *amount* of the tax it was within the power of the legislature to consider the differences in the duration of the mortgages and to *proportion* the rates with reference thereto, but that the power did not exist to fix a tax schedule in which owners of some mortgages were heavily burdened and owners of other mortgages, identical except as to duration, were exempt. The legislature had adopted as a basis for the classification a circumstance which affected only *taxable value* and it was held that the tax treatment could not grossly violate the difference in value between short-term and long-term mortgages. A tax graduated according to the increased number of units is likewise fundamentally based on conceived differences in taxable value—the legislature could not have had in mind a difference in "kind and character" in levying such a tax—and a chain store tax schedule which, in practical operation, grossly ignores such taxable values is as plainly discriminatory as the tax considered in the *Louisville Gas* case. In *Air-Way Electric Appliance Co. v. Day*, 266 U. S. 71, this Court said that "the mere number" of authorized shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of annual fees. This does not imply, as we understand the decision, that the number of such shares may not be *considered* in fixing the fees, but means that factors other than "mere number" must enter into the classification.

As appellant concedes the principle that classification must be supported by reasonable grounds of difference, it well

may be asked: what constitutes such a reasonable "ground"? In every case in which this question is presented to a court, its solution necessarily rests on the relation between two factors: first, the distinction sought to be established as valid; second, the difference in treatment which the state seeks to predicate upon that distinction. It is abundantly clear that the problem never can be solved by attention merely to the first factor. To attempt to do so would lead to absurdity; for example, a court might be faced with this blank question: Does there exist a "substantial difference" between motion picture theaters seating more than one thousand persons and those seating fewer than that number? It is obvious that no court would or could answer this question, without more information. If the distinction were being drawn as the basis for some reasonable safety measure, *e. g.*, the number of exits or width of aisles, it would no doubt be sustained as valid. If, on the other hand, the law further provided that the larger theaters should be subject to a film censorship and the smaller theaters exempt therefrom, the classification might well be deemed "unreasonable", and the difference branded "unsubstantial". To give a closer parallel: whereas it might be entirely reasonable to classify stores in towns of over ten thousand inhabitants, and to subject stores therein located on side streets to a tax of $100 each, and stores located on main business streets to a tax of $110, it would almost certainly be regarded as a denial of equal protection—an unreasonable discrimination—if the latter were taxed $10,000 each. The existence of a "substantial difference" does not *per se* give the legislature a free rein in fixing the graduations and the amount of the exactions in a scheme of classified taxation.

Again, suppose that a chain store tax statute provided for a tax of $1,000 on the first store, but in the case of the addition of five further stores, the tax on each store, including the first, should be $5, could anyone say that the legislature had exercised a rational discretion? Or suppose that the legislature should classify stores by volume of gross sales, and then arbitrarily assess the highest tax against the stores having the lowest sales. All of which is to say that the differences in legislative treatment are as significant as the differences in fact upon which the treatment is predicated.

If (as in the *Louisville Gas* case) the differences which may warrant a reasonable graduation of rates do not necessarily warrant the taxing of some members of a taxable class (mortgages) and the exemption of others; by like reasoning differences may be sufficient to warrant a schedule of rates rationally graduated, but insufficient to justify prohibitive exactions upon certain members and merely nominal rates, which amount to a practical exemption, upon others. The difference between exemption and an insignificant tax is one of degree only.

Although Mr. Justice Holmes dissented in the *Louisville Gas* case, he has been one of the foremost exponents of the theory that the differences of which the courts speak are differences in degree, and in this very dissent he reaffirmed his adherence to the view that the Court should strike down any legislative enactment which falls "very wide of any reasonable mark." Both the majority of the Court and Mr. Justice Holmes support the principle upon which we rely. The application of the present Act to the service station business produces an inequality and injustice more substantial than was presented to the Court by the facts of the *Louisville Gas* case.

Differences may justify a proportioned tax; they may not be sufficient to support progressive graduation. Similarly, a difference may justify moderate progression in graduation, but may be insufficient to support a much more radical progression. A classification may be based upon a difference in fundamental character. In such a case the difference in tax may be wide. Thus, the tax imposed under the provisions of sections 2 and 3 of article 14, chapter 11, CODE OF WEST VIRGINIA, upon every filling station, could not be objected to on the ground that the statute failed to tax grocery stores. On the other hand, long term mortgages may not be taxed and short term mortgages exempted or practically so. The comparison brings out an important distinction between two very different sorts of classifications.

It is clear that the necessary "substantial difference" is not an absolute thing, immutable; inevitably, the "substantiality" of a difference, in relation to a given tax, must depend upon the size of the gap which it is supposed to justify.

For several reasons the principle that the substantiality of a difference must be determined in connection with the use to which the difference is sought to be put is more applicable in relation to progressive and graduated taxation than in any other field. *In the first place*, the difference relied upon is likely to be much more measurable than in other situations. When a distinction is drawn between, let us say, a gasoline service station on the one hand, and a grocery store, on the other, the difference between the taxed class and the exempt class may lie in several directions; collection of the tax may be easier from one than from the other; it may be considered by the legislature that one is of such a fundamental and necessary nature that the price of its

products to the consumer should not be raised indirectly by taxation; one enterprise may be considered more desirable than the other; finally, one may be considered a more profitable business than the other, and therefore better able to bear the additional burden. In the face of these and other possible bases for differentiation, a court is properly reluctant to measure the difference and attempt to relate it to the difference in treatment predicated thereon. But where the distinction is attempted to be drawn, let us say, between thirty service stations and thirty-one service stations, most of the possible bases for the proposed differentiation disappear. The only possible differences which may form the basis of a graduated *revenue* measure are those of *increased advantages* and consequent *increased taxable value*. Certainly, the most patent evidence of taxable value in the "store" business is *profitability*. Differences in profitability, when they exist, can be measured, and courts are unfavorably disposed toward taxation measures which bear no conceivable relation in their gradations to the one basic difference between the taxpayers which could plausibly be pointed out as a sound reason for the differentiation. On this ground alone, then, it is clear that a distinction which might be held to justify a variation in a rate of $10 per unit might be held insufficient to justify a variation of $1,000; the first variation might bear a very just relation to the difference in earning power, whereas the second might be so unrelated thereto, factually and demonstrably, as to evidence clearly that the legislature did not create the classification with only this fair ground for classification in mind, and that therefore the difference in rate is arbitrary, capricious, and unreasonably discriminatory. The application of the present tax to one group comprising commodity store chains and systems of multiple service

stations in West Virginia completely ignores relative efficiency, relative advantages, and relative profitability.

In the second place, where a tax is graduated and progressive, with the increasing rates varying in more than arithmetic progression acording to the numerical increase of some characteristic of the taxed subject, another factor is usually present which impels the courts to scrutinize closely the fairness of the statute. That factor is competition. When the subjects of a tax are non-competitve, courts allow the legislature greater latitude in the variations. The reason for this is not far to seek. The immediate effect of an irregular or extreme variation in rates may in such a situation affect the comparative profitability of the several businesses concerned, but in the absence of competition, the more heavily burdened industry will usually be able to pass on the increased expense to its patrons. Where, on the other hand, the several subjects of the tax are in competition with each other, a baseless differentiation has more serious results. It is, in these circumstances, impossible for the more heavily burdened taxpayer to adjust his business to the new conditions. He can, at most, pass on this new expense only to the extent that the "most favored" competitor is taxed. The difference is a direct and unshiftable drain upon the business unit itself. And as pointed out above, a progressive tax scheme, at any rate a business tax of that nature, by its very nature differentiates between competitors, since the characteristic making for the difference in rate of taxation is merely one of difference in degree—in size, number, or some other quantative characteristic.

The relationship of competition to the problem of discrimination has been made the basis of decision in numerous

cases. It was given recognition in a very recent case in the fourth circuit, where in sustaining a statute imposing a tax upon the business of hydro-electric and steam power companies, but exempting companies generating power by internal combustion engines, the court pointed out as one justification for the tax that "current produced by steam power is the great competing factor on the market with current produced by water power." *South Carolina Power Co. v. Tax Comm.*, 52 F. (2d) 515. The same point was noted by this Court in its opinion affirming the decision. *Broad River Power Co. v. Query*, 288 U. S. 178, 179.

In *Milwaukee v. Lee*, 49 F. (2d) 274 (*aff'd*, 284 U. S. 590), an Oregon statute limited to one the number of licensed agents which foreign fire insurance companies could maintain in cities of less than 50,000 population and to two in cities of more than 50,000. For these the license fee was $2 each. It was provided, however, that other agents might be licensed at $500 per year each. A court of three judges enjoined the enforcement of the statute.

It held that foreign insurance companies duly admitted to do business were entitled to the same protection under the Federal Constitution as domestic companies, that the tax was plainly discriminatory, and that the classification was based on no real or substantial difference having a reasonable relation to the subject of the tax. The obvious effect of a tax of this sort was to place the larger insurance offices at a serious disadvantage with respect to their smaller competitors. It was patently untrue that each extra agent actually increased the efficiency of the agency organization to the extent implied by the license taxes imposed. It was an "unreasonable and unconstituional interference" with the right to transact a competitive business.

In *Fiscal Court v. F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, the tax rate upon "each three-horse wagon operated as a business for hauling freight for pay" was $75, whereas the tax upon four-horse wagons of the same nature was $200. The injunction of the collection of the latter tax against the plaintiff was approved, the court saying:

> "* * * the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. It may be conceded that a reasonable classification for the purpose of license taxes may always be made. *Classification based upon the character of the vehicles and the number of horses used in connection with them may be proper* (*Smith v. City of Louisville*, *9 Ky. Law Rep.* 779), *but the classification sought to be made in this case is manifestly unequal and unreasonable. It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons.* The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class, but it cannot unjustly discriminate between the subdivisions so made. As the order in question unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons, it follows that the license fee of $200, imposed upon four-horse wagons, is therefore void." (Italics ours.)
>
> 117 S. W. 298.

The analogy presented by this case is striking. The tax was a progressive one upon mere increase in size. The court recognized that a classification founded upon the size of vehicles or number of horses may be valid, but it held that there was no fair relationship between the supposed advantages of the larger sized vehicles and the extra burden im-

posed by the act in question. When it is said that the tax "unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons," it is clear that the court held that all possible advantages supporting the distinction were insufficient to justify the tax.

Much the same reasoning controlled the decisions in *Grantham v. City of Chickasa* (Okla.) 9 P. (2d) 747; *Hager v. Walker*, 128 Ky. 1, 107 S. W. 254; *People ex rel Moskowitz v. Jenkins*, 202 N. Y. 53, 94 N. E. 1065.

In the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, MR. JUSTICE BREWER, at pages 111-112, said:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, *we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other.*"

When the inevitable result of a tax is not merely to place one competitor in a less favorable position than another, but actually to decimate or destroy all the profit from a lawful investment, or, in some cases even to cause those engaged in a business to operate at a substantial net loss, and when the competitive situation is such that the taxpayer thus discriminated against cannot adjust his business to absorb the increased burden, the courts recognize that this is not an exercise of a legitimate governmental power, but the arbitrary destruction of business rights, for the benefit of business

competitors, and such a tax must be dealt with as an attempt to violate and destroy the fundamental rights guaranteed in the state and federal Constitutions. *Peterson Baking Co. v. Fremont,* (Nebr.) 228 N. W. 256; *Gillis v. Croft,* 92 Fla. 267, 109 So. 446; *Nafziger Baking Co. v. Salisbury* (Mo.) 48 S. W. (2d) 563; *Riley v. Ayer & Lord Tie Co.,* 147 Miss. 105, 113 So. 214.

It may be inferred from appellant's argument at pages 42-43 of his brief that the levying of an additional tax imposes no actual burdens upon the large distributing companies for the reason that the retail prices are fixed arbitrarily from time to time at their general offices. The reference to the Ashland Refinery Company stipulation (Brief, 43) may suggest that such companies act in c o n c e r t and that there is no real competition between them. The record does not justify such an inference. The Sinclair and Gulf stipulations state that these companies, singly or with other distributors of gasoline, post from time to time the retail prices of gasoline. The names of the other distributors are not given. They may be affiliates or subsidiaries of the Sinclair or Gulf companies. There is no statement in the record to justify the inference, for example, that the Standard Oil Company of New Jersey and the Gulf Company, an organization commonly known to be a vigorous competitor, agree to fix and post a retail price in concert with each other. The Ashland stipulation states that among the larger companies the price is substantially uniform, and that the Ashland company endeavors to conform to such price. Appellee takes no exception to that statement. It is stated in the Standard stipulation that, as a general rule, the retail posted prices of gasoline promulgated by the principal distributors in West

Virginia have been uniform at the same time and place in the several trade areas in the state. (R. 177-178.)

Certainly it is not surprising that there should be substantial uniformity among *competing* oil companies in the retail price of a staple product like gasoline. Sugar, wheat, corn and many other commodities are commonly sold in a given community at a substantially uniform retail price, and yet no one could, or would, suggest that there is not competition as to selling price among large grocery chains handling such commodities, or the products of such commodities.

The stipulation states that the posted price for the appellee's products is determined from time to time at its principal office in New York City, and that there were several changes during the years 1932-1933. (R. 208.) The Court will take judicial notice that wholesale prices of commodities fluctuate from time to time and affect retail prices, and that increased operating expenses and wages, such as the appellee assumed under the National Industrial Recovery program, likewise are reflected in such retail prices. The appellee's requirements are purchased at substantially posted market prices, and changes in the posted retail price of its products reflect open market conditions and any increased operating expenses as well as seasonal trends. Exhibit No. 6, the comparative chart at page 206-A of the record, shows the fluctuations, month by month, in the price of the refined products in the Western Pennsylvania area. The chart shows an upward trend in the wholesale price of refined products in this area from March to September, 1933, and in the retail price of the appellee's products from May to September, 1933, the latter period covering the peak months of motorist consumption. The fair inference in this respect is

that changes in the retail posted price of the appellee's products are controlled largely by wholesale market conditions, both as to supply and demand and prevailing prices, marketing costs and competitive retail prices of other distributors, and that the 1½ cent raise in May, 1933, (which is not shown to have been confined to West Virginia), was occasioned, not by the West Virginia store tax, but by more fundamental conditions within the oil industry, growing out of proration and other factors, and by general changes in price levels judicially known to have been prevalent within the last six months period of the year 1933. But if the distributors of gasoline *could* control the retail price, what could they do about this tax which is imposed at grossly variant rates upon different distributors? Upon what common ground could the various companies meet to adjust their business to this tax, when the five companies with more than 75 stations pay taxes in terms of cents per gallon far in excess of other distributors?

Application of Principles to the Statute

Even a cursory examination of the provisions of the schedule of progression in the rates of taxation reveals unusual features and irregularities and apparent lack of any reasonable or thoughtful legislative purpose. The necessary implication of the schedule is that each new unit in a multiple system from the sixteenth to the twentieth store gives an additional and new advantage of $10 to the system, over and above the advantages previously enjoyed. That is, whereas the tax on the smaller class is $20 per unit, on the larger class it is $30 per unit. As the system grows, that is, in respect to new stores from twenty-one to thirty, it is apparently considered that the cumulative gains over and above

a smaller chain decrease to only $5 for each new unit. But the 31st, 32d, and the next 20 stores, we find, are the bearers of new advantages thirteen times greater for each store than the benefits which accrue from the addition of the ten stores which preceded them. At the 51st store it appears that an unprecedented flood of theretofore untouched advantages accrues; each new store from this point on has all the advantages of the previous ones, and in addition each is presumed to have advantages warranting an additional tax of $100.00. The zenith is reached at the 76th store. There the full beneficent tide of advantages sets in; each unit thereafter added differs from its individual competitor to a degree which the legislature considers may be measured by a money differential in tax rate of $248. A glance at this section of the statute recalls a further pronouncement of this Court in the *Louisville Gas Company* case (277 U. S. 32, 37):

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

The heart of the classification and graduation is the schedule of tax rates. It is the schedule which gives life and substance to the tax scheme. In this case, the classification of the privilege of multiple or chain operation lays the basis for oppression. The steeply graduated schedule of rates completes the work. Even apart from the factual background of the service station business which pays 85.3 per cent of the tax, as collected, the schedule is extraordinary. The sharp and irregular graduations in the schedule indicate the absence of any attempt to classify the privilege of operating various numbers of units, even roughly, according to any rational measurement of the value of the

privilege. In the operation of service stations there is no basis whatever for these unusual and arbitrary rates.

No Factual Differences Between Multiple Stations and Single Stations to Justify Wide Difference in Tax Treatment

In the Analysis of the Record (*ante*) we have referred to numerous facts in the stipulation showing that in the field of service station operation there is an identity of interest among all operators handling the same line of products, whether they operate a single station or many stations. There is no spirit of antagonism like that which exists between the independent grocery store owner and his chain store competitor.

In our brief in the district court we included a *seriatim* discussion of the economic advantages of chain store distribution listed in the opinion in the *Jackson* case. The factors so discussed included "purchasing at quantity discount", "cash discounts", "skill in buying", "warehousing", "abundant capital", "special price policy", "large turnover", "unified advertising", "standard forms of display", "superior management", "special accounting methods", and "standardization of management". The study of the service station business in the stipulation, together with facts of common knowledge, sustain the position of the appellee that to the extent that the foregoing factors exist, they are shared by all service station operators.

At many places in the state, operators of a single station handle the products of several distributing companies. They are called "split-dealers", and, under the appellant's application of the Act, each such dealer is re-

quired to pay $2.50 "store" tax. The volume of business done by many of them exceeds the average sales at the great majority of the stations taxed to the appellee at an average "store" tax of $239.45. The business experience of four such "split dealers" in various parts of the state is given in the record. (R. 193-195.) The Fort Defiance Service Station at Gauley Bridge handles three different brands of motor fuels. During the fiscal year ending February 28, 1933, it sold 73,114 gallons, of which amount approximately 31,728 gallons consisted of appellee's brands. Two of these dealers, Lane's Garage at Belle and J. G. Thumm at Charleston, sold approximately 34,000 gallons of motor fuels in 1932, including appellee's brands. In the same year, 721 out of 948 of appellee's agency stations distributed less than 30,000 gallons of motor fuels, and only 30 sold over 70,000 gallons.

J. A. Blake, operating a single station at Scarbro, had eight gasoline pumps installed at that location, and handled the motor fuels of the Elk Refining Company, American Oil Company, Pure Oil Company, and the Texas Company. His gross sales amounted to $30,611. He would have been required to pay a store tax of $2.50, if the Act had been operative in that year. His distribution of 119,910 gallons of motor fuels in 1932 compares favorably with the best of appellee's company-operated service stations. Only 14 out of 948 agency stations, handling the appellee's motor fuels in 1932, sold more than 100,000 gallons of motor fuels. Of the appellee's 98 company stations, 68 had smaller gross sales in 1932 than did the Blake station. At the beginning of the year 1933, Blake entered into a contract with the Ashland Refining Company for the exclusive sale of its products. According to the tax commissioner's application of

the Act, that single fact serves to impose upon the refining company an average store tax of $133.88, or $131.38 more than the required store tax if Blake had continued to operate his station without such a contract.

One of the examples of directly competitive stations, hereinbefore referred to, aptly illustrates the status of the single station operator in competition with company stations. At Byrd Avenue on the National Road at Wheeling, (Group "H", Photograph Exhibit No. 5; R. 237), the appellee operates a company station. Spears Brothers, Inc. operates a station at the same location handling "Fleet Wing" gasoline. William Price, an agency dealer of the American Oil Company, operates the third station. William Roth, a single station operator, handles the products of the Sun Oil Company at the fourth location. The four stations are pitted against each other to promote the sale of their respective brands of motor fuels and oils. Roth, the dealer in "Blue Sunoco" products, is at no disadvantage whatsoever in meeting the competition of the other three stations (two of which are company-operated, and the third an agency station), because supporting Roth is the whole strength and force of the Sun Oil Company's organization, sales promotion efforts, research, and radio and newspaper advertising. The proof lies in the fact that for the first six months of the year 1933, Roth distributed more gallonage than any of the other stations. The respective gallonage figures for the period are as follows (R. 237):

Station	Gallons Motor Fuel	Average "Store" Tax
Standard Oil Company	60,413	$239.45
American Oil Co. (Agency)	39,431	21.50
Spears Bros. Inc.	66,161	7.28
William Roth	86,986	2.50

Stations similarly situated with respect to size and location can be fairly compared, and upon the assumption that sales of motor fuels, which are the principal source of gross revenue at service stations, are an index of comparable locations, a study has been made of the gross sales and net earnings at the singly-operated Fort Defiance station and at several of the appellee's company-operated and agency stations which sold motor fuels within a range of 5,000 gallons of the Fort Defiance station in the year 1932.

COMPARISON OF SINGLY-OPERATED, AGENCY AND COMPANY-OPERATED STATIONS HANDLING APPELLEE'S PRODUCTS, 1932

Station Location	Motor Fuel Gallonage-Range 68,000-78,000	Total-Gross Revenue	Net Profit
No. 1675—Bluefield	77,440	$18,177.02	$833.00
No. 53—Huntington	70,497	14,901.44	61.00
No. 354—Huntington	75,911	16,599.10	312.00
No. 804—Huntington	70,773	14,868.29	363.00
No. 750—Mt. Hope	78,932	21,500.95	403.00
*H. B. Porterfield, Mullens, agency	73,324	16,920.33	285.96
**Ft. Defiance S. S., Gauley Bridge, individual	73,114	15,834.74	881.57

*The net profit to the agent amounted to $693.20.

**Statement includes only gross revenue from gasoline, oils and grease.

There is not the slightest evidence that the numerous outlets of the appellee and similar companies have in any way hindered the enterprises of the individual dealers. On the contrary, they have the essential facilities of the company-owned stations, without many of the costs of operation. Nevertheless, the tax upon these operators is nominal, while upon the appellee it is destructive. The operating results at the Fort Defiance Service Station, shown in the foregoing table, are illustrative of the fact that the various types of stations operate upon a basis of equality of opportunity for all.

The statement that the owners of multiple stations and of single stations operate on essentially the same economic basis applies equally to the various distributing companies operating the systems of multiple stations. Spears Brothers, Inc. has the advantage of every economic factor with respect to its 8 stations in Wheeling that the appellee enjoys in conducting its stations in the same community. The same is true of the Maynard Stations at Williamson (R. 191-192), and of the companies shown in the groups of competitive stations. (R. 233-238.) Every significant factor in the operation—commodity costs, labor, fuel, equipment costs, etc.—affects all systems in substantially the same way.

It cannot be inferred from the record that there is an absence of competition among distributing companies. There is the keenest competition among them, and every statement of fact in the record points to the conclusion that the single station operators benefit from, and thrive upon, it. Each distributor urges upon dealers handling its products the benefit of its methods to meet this competition. Thus the operators of multiple stations share with their retail competitors the benefits of their experience and resources. The district court characterized the relation of single stations to multiple stations as follows:

> "And the somewhat elaborate stipulation of facts in the case very clearly leads to the conclusion that the combined characteristics which feature the typical chain store system and which have served as a basis for special classification do not inhere in multiple ownership or control of filling stations as compared with individual or independent ownership and operation of a single filling station." (R. 268.)

These considerations compel the conclusion that the extreme divergence in tax treatment accorded the single station operators and the operators of more than 75 stations cannot be said even roughly to conform to the supporting background of facts.

The Sharply-Defined Treatment of Multiple Service Station Operators as Distinguished From Other Forms of Chain Business

Appellant admits that in general the "store" tax undoubtedly "is heavier on service stations than on other chains." (Brief, 33.) His attempted justification is threefold: (a) that the collection of large sums from service station operators is related to the object of the Act to raise revenue (Brief, 47); (b) that the relation of the "store" tax to gross revenue is irrelevant because "gross sales is not the basis of the classification here involved" (Brief, 35); and (c) that the unit measure adopted is the same for all, and therefore it is of no consequence that the Act, in its practical effect, produces inequality between ordinary store chains and multiple service station operators (Brief, 35).

In seeking justification for the application of the Act to ordinary store chains and service station systems, the district court did not confine its attention to the relation of gross revenue and net earnings to number of units. (R. 254-55.) It considered also the less measurable aspects of multiple unit organization. (R. 263.) With respect to gross revenue and net earnings, the district court concluded (R. 254-55):

> "The figures at least warrant the final conclusion that the addition of large numbers of new stations, in excess say of 150 stations, has been accompanied

> by diminishing rather than by increasing returns; that the volume of business of even the very best stations has been on the average less than one-half of the average business done by general commodity stores in their least active units, and that the volume of business on the average of all gas stations over 150 per chain has been so small that little or no profit would have remained after payment of such a tax as that imposed by the state. The net profits of general commodity chain organizations subjected to the tax, are not available, but the ratio of the tax borne by them to their gross revenue, is in no way comparable with the similar ratio in the case of oil company stations, and it is a fair inference that a similar disparity exists as to the ratio of the tax to net earnings of each class of chain organizations."

The inequality here present is sharply defined as to a single type of chain organization. The injustice to service station operators is of major character, and inevitable. It is neither a minor nor incidental injustice.

In its practical operation, the tax is a regressive tax as applied to the taxpayers who pay the bulk of the revenue thereunder. The relation of the "store" tax to gross revenue for the year 1932 brings into bold relief the inherent unreasonableness of the statute when so applied. Any injustice done as between the Kinney Company and Sears, Roebuck (both operators of typical chain stores) is minor in character when it is considered that in each case the "store" tax is a small fraction of 1% of the gross revenue. The tax paid by the Great Atlantic & Pacific Tea Company, the store chain with the largest gross revenue and greatest number of units in the state, is but 1-3 of 1% of its gross revenue. The average for *all* store chains is less than 1-12 of 1% of gross revenue. The "store" taxes paid by all operators of more

than one service station average 3% of their gross revenue. In contrast with the largest chain store, the "store" tax of the appellee, computed on the number of units operated in 1932, is 4.2% of its gross revenue for that year, in the case of the Ashland Refining Company the tax is 4.3% of gross revenue, and in the case of the Gulf Refining Company 7% of its gross revenue.*

In all the chain store tax cases, arising in federal courts, except the *Jackson* (283 U. S. 527) and *Penny Stores* (59 F. (2d) 789) cases, the statute under which the tax was levied expressly excluded filling stations. In the two cases named, no operator of multiple service stations was a party to the complaint. The federal courts have recognized that a substantial difference exists between stores and service stations, but have never had occasion to test the validity of this type of legislation, as applied to the latter type of business.

Two federal decisions have distinguished the application of chain store tax statutes to typical store chains and to service station systems. *Southern Grocery Stores v. Tax Commission, supra*; *Liggett v. Lee, supra.* In the *Liggett* case this Court pointed out that the true *ratio decidendi* of the *Jackson* decision is not based "upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the ev-

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*The gross revenue figure of the service station operators is based on the price of motor fuels to the motorist, which includes the state gallonage tax. If this were not done, the percentage of tax to gross revenue would be greatly increased. In the case of the appellee, this figure is $6,319,012. The appellant states (Brief, 36) that the tax is but 2.87% of appellee's gross revenue. Appellant arrives at this somewhat smaller percentage by using $8,381,195.48 as the amount of gross revenue ($10,198,453.32 less the $1,817,257.84 gallonage taxes paid in 1932). This figure includes gross revenue from other than taxable units in the state. As the tax is imposed upon "stores" in the state and nothing else, the district court used the revenue from the marketing units ($6,319,012 adjusted by the court to include tires, etc. sold at agency stations, R. 278).

idence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually-operated small store." The fact that the Court viewed the tax in this broad way lends peculiar significance to its approval of the exclusion of filling stations from the tax scheme. In the case of typical commodity chains, the Court found exclusive advantages in chain organization, management, merchandising methods, and type of business sufficient to justify the legislative classification imposing a higher tax on stores which are part of a larger system. But whatever the situation may be in a typical commodity chain, the general conduct and methods of service stations do not vary substantially whether they are members of a chain or individually-operated outlets. The absence of this ultimate fact of distinction in the service station business was recognized by this district court and went far to control its decree.

Legislative Declaration Can Not Make an Arbitrary Classification and Graduation Valid

As we read the tax commissioner's answer, it is his position that the present situation was deliberately and designedly brought about. From paragraphs XIV (d) and XV (b) we understand his position to be that it is a matter of no importance that the tax bears no relation to the ability of the taxpayer to pay, to his income or earnings, to his receipts or losses, or that it is in no way proportioned to capital or value. The justification for the exaction in his mind is that the tax is reasonably proportioned to the "opportunity to engage in the store business." Possibly a tax of this kind will be *prima facie* presumed to be in proportion to the value of the opportunity or privilege of doing

the thing which is taxed, but the mere statement of the presumption does not amount to absolute justification or proof.

> " 'It is apparent,' this court said in the Bailey case, 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by a direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' "
> *Heiner v. Donnan*, 285 U. S. 312, 329.

The legislative power to tax and the presumption of constitutionality are insufficient support for a tax laid upon such a loosely conceived privilege as the operation of "stores". Excessive and burdensome rates of taxation upon "stores" are unwarranted. How large is a "store"? What are the gross or net earnings of a "store"? What investment is required to create a "store"? What is the turnover of a "store"? If these questions appear absurd, what of the assumption relied upon by the appellant that the legislature may lay taxes in any amount upon an assumed taxable subject the name of which connotes absolutely no factor indicative of taxable qualities or values? It is one thing to hold, as this Court did in the *Jackson* case, that the addition of any "store", however small and of whatever character, may be the subject of a nominal privilege tax, but it is quite a different matter to contend that the same uncertain and assumed conception may be used as the basis for a tax sufficient in size to destroy the systems of service station operation which have been made the principal subjects of this tax. Taxes cannot be laid in so reckless a fashion.

"Some relation" between the tax and the *value* of the privilege subjected thereto is requisite to any such tax. *Airway Appliance Co. v. Day*, 266 U. S. 71.

It has been held that a "lot" is not a proper standard of taxation. "The very term taxation, whether used in the Constitution or elsewhere, signifies a proportioned charge, upon some uniform standard, either of value or something else, which will afford a means of comparison." *Woodbridge v. Detroit,* 8 Mich. 274, 293. A tax is not proportioned if it increases according to numbers of "lots" or "stores", it being obvious that such units may embrace grossly unequal "lots" or "stores". It is clear that the "store" unit of taxation is not adapted to high rates.

Merely abstract conceptions of a privilege can not measure the reasonableness of the tax. Constitutional principles do not operate *in vacuo.* The "mere fact of classification" does not save the enactment from constitutional inhibitions. It must be based upon "some reasonable grounds". *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* 165 U. S. 150. In determining the validity of a classified tax, the groundwork of facts is controlling. This is a practical rule, indicating that a tax classification must bear some reasonable relation to some taxable quality, and it is the direct antithesis of the statement in the answer that to justify the tax the court need look no further, once it determines that the taxpayer is taking advantage of the opportunity of engaging in the "store business".

Arbitrary exactions in the guise of taxes find no support in any judicial statement sustaining legislative discretion, but violate the principle that classification for tax purposes must rest upon some reasonable difference having a fair and substantial relation to the object of the legislation. *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389.

It was said in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237, that in the matter of imposing taxes, selecting the subjects of taxation, and varying the rates, the legislative discretion is broad so long as it proceeds within reasonable limits. The possible reasonableness of a given classification for purposes of taxation being conceded, the differences in rates predicated upon the classification must be related to the degree of difference in situation which is the measure of taxable value. *Louisville Gas & Elec. Co. v. Coleman*, and *Fiscal Court v. Cox, supra.* In the *Jackson* case, MR. JUSTICE ROBERTS prefaced his opinion and discussion with the statement that the state sought to justify the measure only under the power of the legislature in prescribing an occupation tax, to classify business, "so long as its action is not unreasonable and arbitrary." No contention was made in that case, and none can be properly made that the legislative authority with respect to classification and rate schedules is without limits. "With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis." *Ohio Oil Company v. Conway*, 281 U. S. 146, 160. In his dissenting opinion in the *Liggett* case, MR. JUSTICE CARDOZO expressed disagreement with the majority opinion establishing the invalidity of the county line classification, on the ground that the theory of the statute seemed to him to satisfy the "rough and ready form of justice" required in chain store taxation. But in the same dissent he also stated that such legislation must not "go so far as to outrun the bounds of reason." No fact exists which warrants the view that the "bounds of reason" were observed in the fashioning of the tax here involved.

C. THE APPELLANT'S APPLICATION OF THE ACT PRODUCES A DISCRIMINATION SO ARBITRARY AND CAPRICIOUS AS TO AMOUNT TO THE CONFISCATION OF THE APPELLEE'S PROPERTY AND BUSINESS WITHOUT DUE PROCESS OF LAW.

Appellant's statement of the federal questions involved (Brief, 16) indicates a misconception of the exact significance which appellee attaches to the "confiscation" of its earnings which the tax brings about. We do not contend that such "confiscation" presents a separable and distinct constitutional issue. This Court has said that a *federal* statute passed under the taxing power may be "so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment" (*Tyler v. United States*, 281 U. S. 497), and by like reasoning we see no reason why a *state* statute may not fall before the similar clause of the Fourteenth Amendment.

It is manifest that the principal taxpayers under existing conditions or any conditions which reasonably may be anticipated, can not long operate systems of stations which by no possible means can earn the license tax. The district court summarized the effect of the tax upon the appellee as follows (R. 270-71):

> "The application of the Act to the plaintiff becomes exceedingly onerous. There is force in the plaintiff's contention that it practically confiscates the value of the plaintiff's property by absorbing under the form of a license tax for privilege to do the business, the whole net profits of the business, and this not by virtue of faulty or inefficient management but from the very nature of the business itself.
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> * * *

> "The possible volume of business for most of these stations is necessarily limited in amount. It is therefore natural to find, as is shown by the stipulation of facts, that the average net profit per station does not exceed a few hundred dollars a year and yet this tax as applied to the Standard Oil Company, the plaintiff in this case, requires the payment of a license tax of about $240 per station, thus exceeding the annual net profits of the whole business. The result will be obvious—either the abandonment of the stations, thus resulting in a detriment to the public and incidentally a cessation of the revenue, or some entire re-organization of the business which may be less convenient to the public." (To like effect, see SOPER, R. 265.)

The case of *Towne v. McElligott*, 274 Fed. 960 (D. C. S. D. N. Y.) contains a statement which is expressive of appellee's position in this connection. The plaintiff there contended that the federal war-time income tax was so high as to amount to confiscation under the Fifth Amendment. In disposing of this contention JUDGE LEARNED HAND said:

> "The term 'confiscatory', when so used, is clearly one of degree, because literally all taxes are pro tanto confiscatory. Except as it imports some inequality of burden, not here suggested, it can mean nothing but that there is a measure to the amount which the government may seize in taxes for its own purposes. The plaintiff relies on certain language in Brushaber v. Union Pac. Ry., 240 U. S. 1, 24, 25, 36 Sup. Ct. 236, 60 L. ed. 493, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713, which broken from its context, he thinks helps his contention. *The meaning of that language is only that there may be inequalities in the rates of levy great enough to become a confiscation of the income which suffered the highest rates.*" (Italics ours.)

The basic principle upon which appellee stands is inequality, discrimination against certain taxpayers and in favor of others. "Confiscation", as the term is here used, expresses realistically the oppression which flows from that discrimination.

D. HOUSE BILL NO. 112 HAS NO APPLICATION TO THE SERVICE STATIONS AND BULK PLANTS OF THE APPELLEE.

The district court not only passed upon the federal constitutional question raised by the appellee, but also held, as a matter of construction, that the statute does not apply to gasoline service stations and bulk plants. In so doing, the court acted upon the settled principle that the presentation of a substantial federal question for adjudication empowered it to determine all questions raised, whether of federal or state law, irrespective of the disposition of the federal question. (R. 249-250.) The correctness of this jurisdictional principle is expressly recognized by the appellant. (Brief, 51.)

The alleged liability of the appellee for the payment of a license tax under the Act rests wholly upon the *interpretation and rulings of the tax commissioner* that the terms "stores" and "mercantile establishments", as used in the statute, include the 101 service stations owned and operated by the appellee, the 388 leased outlets and 460 vending privilege outlets operated pursuant to agency agreements, and the 54 bulk plants used in the distribution of its petroleum products. Appellee contended below that the Act, properly construed, does not include service stations and bulk plants, and the district court sustained this contention. (R. 265-276.) The appellant, in his brief, disregards many of

the reasons assigned, but mentions prominently the argument that the words "mercantile establishment", used in section 8 of the Act could not extend the scope of the statute beyond the meaning of the word "stores" used in the title. This argument was made below merely as preliminary to the comprehensive consideration of the question of construction presented. The point, however, may be restated briefly.

1. The Act Designates "Stores" as the Subjects of the License Tax.

In several states the titles of similar acts refer expressly to both "stores" and "mercantile establishments" (Louisiana Acts 1932, No. 19, p. 125; South Carolina Acts 1930, No. 829, p. 1384); the title of the West Virginia statute recites that it is "an act requiring licenses for the operation, maintenance, opening, or establishment of *stores* in the state." Section 1 provides that it shall be unlawful to "operate, maintain, open or establish any *store*," etc. Section 2 provides for the procuring of licenses by those desiring "to operate, maintain, open or establish a '*store*' in the state." Except in the definitive section (section 8) and in section 5, which contains the schedule of license fees, the word "stores" appears throughout the Act without any limitation or additional wording. The particularity and directness with which "stores" are specified in the title and in the enacting sections of the statute show a fixed intent and object to exact a license tax from the class of establishments which is included in that term.

An act must embrace but one object, and that must be expressed in the title. Statutory provisions can not proceed beyond the single object so expressed. If it be considered, therefore, that the words "mercantile establishment"

in section 8 enlarge upon the language of the title, this could only have the effect of rendering void the offending section to that extent. CONSTITUTION OF WEST VIRGINIA, art. VI, s. 30. The Supreme Court of Appeals of West Virginia has consistently enforced this constitutional rule, quoted in appellant's brief, and within recent months has stricken down important provisions of at least three legislative measures on the ground that they transcended the purposes announced in their respective titles. A title "need not descend to particulars, but it must be broad enough to give a fair and reasonable index to all the purposes of the Act." *Boggess v. Johnson,* 113 W. Va. 193, 167 S. E. 82. A statute may contain many parts germané to the title, but any provision which cannot be traced to the title is void *in toto*. *Moats v. Cook,* 113 W. Va. 151, 167 S. E. 137.

Section 8 of the statute (R. 40) states that:

> "The term 'store' as used in this act shall be construed to mean and include *any store or stores or any mercantile establishment or establishments* which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale." (Italics ours.)

Under proper rules of construction the only tenable interpretation of the above provision is that the legislation is not directed against all buying and selling of merchandise which may be carried on in divers ways and in divers places in the state, but only against the particular places of business which are denominated "stores". The expression "mercantile establishment" adds no new place of business or classes of business to those commonly embraced

in the specific word "stores", but embraces only such places as are included within that term. The word "stores" has a well known limited and restricted meaning, in popular acceptation, and, where a term of such specific and definite import is employed in a statute, the doctrine of *ejusdem generis* requires that general words which follow should be held to include only such things as are within the compass of the preceding definite expression. 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, (2d ed.) pp. 814-15; *Gates & Son v. City of Richmond,* 103 Va. 702, 49 S. E. 865.

The case of *Leonhart v. Board of Education* (W. Va. 1934) 170 S. E. 418, 420, cited by the appellant, contributes nothing new to this discussion. It restates the general principle laid down in the *Boggess* case, *supra.* It does not answer the ultimate question here. If the term "mercantile establishment", as used in the body of the Act, does not fall within the doctrine of *ejusdem generis,* and if it extends the scope of the Act to places of business not already included within the popular and statutory concept of the word "stores", then the use of the term is something more than a mere particularization and the title must give notice of the fact.

From the definite manner in which the Act is directed against the operation of "stores", it is plain that the incidental and subsequent use of the expression "mercantile establishment" adds nothing to its provisions. The appellant finally qualifies his position on the point, saying that whether or not the use of the words "mercantile establishment" has the effect of making more comprehensive the

meaning of the word "stores", the title reference to "stores" sufficiently meets the constitutional requirement to sustain the interpretation that gasoline service stations and bulk plants fall within the operation of the Act. (Brief, 53.)

2. The Legislature Used the Word "Stores" in Its Ordinary, Popular Signification, Which Does Not Include "Service Stations" and "Bulk Plants."

The appellant correctly states (Brief, 53) that there are but two cases, other than the case at bar, which pass upon the applicability of chain store legislation to gasoline service stations and bulk plants. *Wadhams Oil Co. v. State*, 210 Wis. 448, 245 N. W. 646, *on rehearing*, 210 Wis. 457, 246 N. W. 687, and *Midwestern Petroleum Corp. v. State Board of Tax Com'rs* (Ind. 1933) 187 N. E. 882, *rehearing denied*, 191 N. E. 153.

The appellant advances the identical argument which was rejected in the *Wadhams* case (246 N. W. 687, 688), but which was approved in the *Midwestern Petroleum* case. Relying on a certain dictionary definition that a "store" is "*any place* where goods are kept for sale, whether by wholesale or retail; a shop," the appellant reasons that gasoline and motor oils are "merchandise" (appellee has never contended otherwise), and that service stations and bulk plants are "places" where such merchandise are sold.

Appellant looks primarily to the dictionary, though he ignores the portion of the definition which makes "stores" synonymous with "shop". We look primarily to the language of the Act itself to determine its applicability to service stations and bulk plants. The defi-

nition of the word "store" in the Act is not the dictionary definition. The legislature deliberately used language in section 8 which assigns to the word its ordinary, popular meaning. The term "store", it said, shall be construed to mean and include *"any store or stores or any mercantile establishment or establishments"*. As already noted, the incidental descriptive use of the expression "mercantile establishment" does not and can not extend the definition of "store", or enlarge the operation of the Act.

Having this statutory definition in mind, the district court said (R. 265-6):

> "Does the definition of a 'store' in the Act cover the gasoline 'filling' or 'service' stations conducted by the plaintiff and described in the stipulation? It is unnecessary to repeat the description in any detail as it is a familiar city or roadside spectacle well known to all at this time. Under a substantially similar statute it has very recently been decided in Indiana (Midwestern Petroleum Corp. v. State Board, Ind. Supreme Co. Dec. 15, 1933) in the affirmative; while in a very fully considered opinion (adhered to on rehearing) it has been decided in the negative in Wisconsin (Wadhams Oil Co. v. Wisconsin, 245 N. W. 646, 246 N. W. 687). In the former case the decision is based almost entirely on the ground that the word 'store' in its dictionary sense is literally broad enough to cover the typical gasoline or service station because it comprehends a place where gasoline or similar automobile necessities, articles of merchandise, are sold at retail. In the latter case there was applied the well known principle of statutory construction that 'as a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it appears from the context or otherwise that they were used in a different sense.' 2 Lewis' Sutherland Statutory

> Construction (2d Ed.) sec. 390; Old Colony R. R. v. Commissioner, 284 U. S. 552, 560. It was correctly said by the Wisconsin Court that 'in common language a filling station is not referred to as a store, or a mercantile establishment where goods, wares or merchandise are sold or offered for sale at retail.' A comparison of the reasoning in the two opinions leads us to the conclusion that the sounder rule as applied to this case is that adopted by the Wisconsin Court. The dictionary definition of 'store' is clearly too broad to be here controlling."

The Supreme Court of Wisconsin, through CHIEF JUSTICE ROSENBERRY, in the *Wadhams* case, *supra*, emphasizes the point which appellee makes here, that legislative language must be so read as to accord to it a natural rather than an artificial meaning. The opinion is in part as follows:

> "If one were to stop five hundred well-informed intelligent persons traveling into any city and ask them to stop at the first store or mercantile establishment where goods, wares, or merchandise were sold or offered for sale, it is quite probable that not a single one would stop at a filling station or service station such as is described in the plaintiff's complaint. This distinction which exists in the minds of the great mass of people in the use of these terms must have been present in the mind of the legislature when the act was passed. Had the legislature intended to include such establishments as are described in the complaint, it would have used appropriate language for that purpose. We therefore conclude that establishments of the kind described in the complaint are not within the terms of the act and that the plaintiff is entitled to recover the moneys paid under the act." (Italics ours.) (245 N. W. 646, 649.)

Appellant questions the accuracy of the observation by CHIEF JUSTICE ROSENBERRY in the above quotation concerning "five hundred well informed intelligent persons." Against this, he pits the comment of the Indiana court, that, if five hundred such persons were asked for a definition of the word "store", they would give substantially the dictionary definition. (Brief, 58-9). Taken together, the respective comments of the Wisconsin and Indiana courts merely illustrate the difficulties inherent in the use of language, and show that the word "store" *has* in fact a more limited meaning in ordinary discourse than is assigned to it by the lexicographer.

While admitting that the places of business, at which petroleum products are sold, are referred to as "service stations", the appellant charges in paragraph XII of his answer (R. 89-90) that the expression is not exclusive of the more general term "stores". He illustrates his assertion there by a comparison with "lumber yards" and "plumbing shops", which he avers, are within the broad meaning of the word "stores". Presumably he might have added "stock yards", "junk yards", "coal yards", "dairies" and a great many other such places, none of which, we think, come within the popular understanding of "stores". Indeed, this argument is merely a particularization of the more general proposition that, from the viewpoint of the lexicographer, perhaps all places where commodities are housed for storage or sale are "stores" in a literal sense. That viewpoint does not govern this case.

Nor do other lexicographers extend the term "stores" to the full limit indicated by the definition quoted from Webster. The Standard Dictionary defines the word thus: "A

place where merchandise of any kind is kept for sale; a shop; as, a grocery store; a wholesale-store." The Oxford Dictionary gives the definition, "A place where merchandise is kept for sale," and it explains that the term was early used in the United States and some British colonies to denote a large-scale shop, dealing in a great variety of articles, but that today in these countries it is the usual equivalent for "shop". It is correct to say that a store is a place where merchandise is kept for sale, but it is not true that *all places* where merchandise is so kept are "stores", as the word is commonly understood.

The meaning of a word is not rigid and unchanging for all time. Conceivably, at some future time people may come to use the word "store" to refer to businesses of the type conducted by appellee, but the controlling proposition is that the word had a definite popular signification at the time it was incorporated into the Act, and that signification did not, and does not, embrace "filling stations" or "service stations".

Abstract definitions of words cannot control their meaning in a particular context. The prevailing principle of construction is that the words of a statute are to be taken in their ordinary, popular sense. We may be certain that this principle reaches the legislative intent, recorded in the Act itself, to assign to the word "store" the same limited meaning which it has in every day conversation to designate certain ordinary places of business, usually an enclosed room in a building, where common articles of trade and commerce are offered for sale. In common speech the word has a definite range of meaning, and no one refers to a service station or bulk plant as a "store". In all probability no one ever referred to a filling station as a "gasoline store."

In denying a motion for rehearing in the *Wadhams* case, *supra*, the Wisconsin court reiterated and elaborated its reasoning as follows:

> "There is no difficulty in discovering the intent of the legislature. * * * The legislature intended to require a license fee from every person, firm, corporation, or association engaged in the chain store business. Section 5 (1) defines what in the mind of the legislature amounted to a chain store as follows: 'Every person, firm, corporation, or association engaged in the business of operating or maintaining in this state under the same general management, supervision and ownership two or more stores or mercantile establishments where goods, wares or merchandise are sold or offered for sale at retail shall for the purposes of this section be deemed to be engaged in the chain store business.'
>
> "The question is not what the legislature intended, but what did it mean when it used the language quoted. If the legislature had intended to be all-inclusive, other appropriate language might have been used. In the definition, it might have said, instead of a store or mercantile establishment 'a place', and inserted after the word 'merchandise' the words 'of any kind', and phrased the statute as follows: 'Every person, firm, corporation or association engaged in the business of operating or maintaining in this state under the same general management, supervision and ownership two or more places where goods, wares or merchandise of any kind are sold or offered for sale at retail shall for the purposes of this section be deemed to be engaged in the chain store business.'
>
> "So phrased, the statute would have included filling stations and many other establishments not within the terms of the act as we shall see.

"The case is argued here as if the court had invented some rule of construction. The legislature itself has established rules for the construction of statutes (chapter 370). The first rule laid down, section 370.01 (1) is as follows: 'All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.'

"There are many places where goods, wares and merchandise of some kind are kept for sale which would not be understood, according to the common and approved usage of the language, to be stores or mercantile establishments. Among these might be enumerated tailor shops, shoe shining parlors, wood yards, lumber yards, brick yards, stone quarries, news stands, fruit stands, flower stands, cheese factories, restaurants, hotels and no doubt others. On many farms farm produce is kept for sale at retail and many small manufacturers maintain retail dedepartments as part of their business. The same argument which supports the conclusion reached in the brief that a gasoline filling station is a store would support the conclusion that a brick yard is a store. It is a place where goods, wares, and merchandise are kept for sale at retail. No one could reasonably argue that the legislature used the term 'store or mercantile establishment' on any such wide, comprehensive and unrestricted sense. No one has yet pointed out that according to the common and approved usage of the language the term 'store' or 'mercantile establishment' has ever been applied to a gasoline filling station. In thus interpreting the language of the statute, we follow the command of the legislature. This statutory provision with respect to construction merely adopts the rule universally applied by courts." (246 N. W. 687, 688).

Appellant, looking to the supposititious definition of the word "store" which the Wisconsin court suggests would be inclusive of filling stations, calls attention to the words "goods, wares, or merchandise of *any kind*" which appear in the West Virginia statute, and argues that it is not unlikely the Wisconsin court would have held filling stations within the terms of such an act. (Brief, 62.) A fair reading of the foregoing quotation shows unmistakably that the suggested changes were not made in the alternative and that the fundamental change suggested as necessary to bring service stations within the statute was the substitution of the word "place" for the expression "store or mercantile establishment."

The following authorities evidence a strong tendency on the part of courts to assign a meaning to the words of a statute or ordinance according to their ordinary, popular acceptation, where such meaning differs from that found in dictionaries. In *City and County of San Francisco v. Larsen*, 165 Cal. 179, 131 Pac. 366, it was charged that defendant, a restaurant keeper, was within an ordinance imposing a license tax on any person who "at any fixed place of business, sells or manufactures goods, wares or merchandise." The court found that, although literally he was engaged in the business of manufacturing goods, and although technically there was a sale of food so manufactured, yet—

> "We must look to the phrase as a whole, consider its object and purpose, and *give it a meaning according to the ordinary acceptation of the words used.* When we speak of a place where the businesses of selling or manufacturing goods, wares, or merchandise is carried on, we do not usually think of restaurants in that connection * * * A restaurant keeper is not, according to ordinary usage, either a mer-

> chant or a manufacturer. * * * We are of the opinion that this phrase in the Charter was used in its ordinary acceptation to describe what is usually understood by the words when used in that collocation and that, when so understood, the business of selling or manufacturing goods, wares, or merchandise does not include the business of keeping a hotel or restaurant." (Italics ours.)

Likewise, in *State v. Hanchette*, 88 Kan. 864, 129 Pac. 1184, the court held that the sale of hydrogen peroxide at a ten cent store was not a violation of an act forbidding the sale of medicines except by registered pharmacists.

> "From all the evidence in this case it appears that this preparation falls in the class of witch hazel, Pond's Extract, vaseline, and many other like household remedies which in the technical sense of the physician have curative, alleviative, and pleasant effects from their application, and hence are called medicines, but *in the common use of the language are not so designated.*" (Italics ours.)

That the principle applies particularly in the interpretation of tax laws was held in *Evening Journal Ass'n v. State Board of Assessors*, 47 N. J. L. 36, 54 Am. Rep. 114, where the court said:

> "The interpretation of words in their popular sense rather than according to their scientific meaning is peculiarly required in the construction of tax laws. * * * *In the construction of such laws the courts will incline strongly toward the popular signification of language.* * * * It is true that in the production of his newspaper, which he sells, he employs manual labor and mechanical skill * * * In the ordinary and general use of the word 'manufacturer', the publishing of a newspaper does not come within the popular meaning of the term." (Italics ours.)

The same view has been expressed with reference to the word "store". In *State v. Wilson*, 47 N. H. 101, 104, the court said:

> "It is the popular name and designation and not the general character and use of the building which must govern the interpretation of the law. * * * But they designated the buildings meant by their appropriate names, and no building not denominated a warehouse or granary as its proper and distinctive name, can be construed to be a warehouse or a granary within the meaning of the statute * * *
>
> "*But if we were to follow the definitions found in the dictionaries, it would be easy to show that a granary is a warehouse and a store is a warehouse, and vice-versa* * * * *Tracing the meaning of the words used in the statute through these definitions, the term store alone would be sufficient to cover all the buildings named in this clause of the statute, and many more* * * * Why, then, is not a granary a warehouse or store within the meaning of the statute? Simply because a warehouse is not the popular name of a building such as is usually devoted to the storage of corn and grain; and therefore, to bring granaries within the statute, it was necessary to add them to the former list." (Italics ours.)

Appellant purports to recognize the principle of construction, quoted by the district court from LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, that words of a statute are to be taken in their ordinary, popular sense. But nowhere does that treatise indicate that dictionaries are the final arbiters of the meaning ascribed by the legislature to the words of a statute. The proper rôle of the dictionary in the process of statutory construction is well stated by the following authority:

"Dictionaries, both legal, scientific, and general, may be consulted by the courts, in proper cases, in the construction of a statute. It is indeed quite customary for judicial tribunals to turn to the standard lexicons for aid in determining the meaning to be assigned to words of common speech or to technical terms. They do not recognize these works as binding authorities, which they are imperatively required to follow, but consider their definitions as persuasive evidence in support of the conclusions which they are induced, on other and more weighty considerations, to adopt. * * * 'the best dictionary is but a guide to the true meaning of a word in a particular context, and can never be an absolute authority on so varied and fluctuating a subject as language. It facilitates the comparison of the different meanings of a word, and aids the memory of the person in search of the particular meaning, but can rarely anticipate the exact color which will be given to any word or phrase by the context in which it is set.' And 'no meaning of a word which has received a construction, by law or uniform custom, can be adopted from the dictionaries in conflict with that construction. And where a word is reconcilable with law or established custom in the particular manner in which it is used, a different meaning cannot be given to it upon the authority of a lexicographer.'"

BLACK, INTERPRETATION OF LAWS (1896) pp. 198-199.

The Indiana court in the *Midwestern Petroleum* case, *supra,* upon which appellant relies, rewrote and revised the familiar principle of construction by inserting the word "dictionary" as follows:

"It should be accepted as the rule that non-technical words used in the title of an act, or in the act itself will be construed according to their ordin-

> ary and accepted *dictionary* meaning, unless an intention to convey some other or different meaning can be gathered from the context." (Italics ours.)

This newly-fashioned principle makes the dictionary practically a binding authority, and was the basis of the Indiana court's ruling in that very case. In this we think that court was led astray. Notwithstanding Webster's definition that a "store" is "*any place* where goods are kept for sale," and the more limited definition in the Indiana statute that a "store" is a "*store or mercantile establishment* in which goods, wares or merchandise * * * are sold," the court undertook to state that "the definition of the word 'store' contained in the body of the act conforms almost exactly to the dictionary meaning, thus indicating the legislative understanding of that word." After the decision in the case at bar, the Indiana court denied a rehearing in the *Midwestern Petroleum* case (191 N. E. 153). The dissenting opinion filed by JUDGE MYERS is a forceful statement of the error into which the majority fell in construing the statute.

> "To my way of thinking, the sole question in this case, under the facts pleaded, is whether appellant is without the legislative definition of the word 'store.' *The majority opinion has chosen to give the word 'store,' as used in the act, its dictionary definition instead of the limited meaning given to it by the legislature.* The title of the act relating to stores is general, but in the act it is specific. In such cases, in the construction of statutes, a specific provision will prevail over a general provision involving the same subject matter. * * * the legislature was not content to use the broad dictionary definition when defining 'store' in what is commonly known as the Chain Store Act, * * *. The dictionary definition includes the words 'any place,' which might well be

construed as applying to peanut pushcarts and street corner venders, for they are at a place when the sale is made, while the word 'store' in the so-called Chain Store Act is construed to mean any store in which goods, wares or merchandise of any kind are sold either at retail or wholesale.

"It is said, if the legislature intended to exclude filling stations along the roadside or bulk stations, it would have said so, but, on the other hand, it may as well be said that, if it was the legislative intention to include roadside filling stations and bulk stations, without naming them, the legislature would have said a store is 'any place where goods are kept for sale,' thus indicating an intention to adopt the dictionary definition. * * *

"In my opinion the identical question for our decision was considered and decided adversely to the majority opinion in this case by a three-judge United States District Court for the Southern District of West Virginia. Standard Oil Co. of New Jersey v. Fox, Tax Commissioner, 6 F. Supp. 494. The opinion in that case, in my judgment, rests upon sound legal principles, and I am persuaded to adopt it as controlling of the case at bar." (191 N. E. 153, 154.) (Italics ours.)

The appellant says that reason, lexicology and precedent are favorable to his view. We have shown that lexicology does not always accord with the popular meaning of words. As to the factor of precedent, appellant, at pages 54-65 of his brief, discusses some thirteen cases, and concludes with the statement that—

"Under ordinary dictionary definitions, which all of the courts in the other cases, other than the Wisconsin court, have recognized as the popular and common understanding meaning of the word 'stores', the meaning of that word as used in the sta-

> tute in question should be clear without the necessity of resorting to extrinsic evidence."

The authorities cited by appellant are an insufficient foundation for this statement. Aside from the *Midwestern Petroleum* case, *supra*, in only three of the cases cited do the courts refer at all to dictionary definitions of words (*Gunther v. Atlantic Refining Co.*, 277 Pa. 289, 121 Atl. 53; *Charleston Oil Co. v. Poulnot*, 143 S. C. 283, 141 S. E. 454; *Viquesney v. Kansas City*, 305 Mo. 488, 266 S. W. 700), and of these three, only in the *Gunther* case was the court dealing with the word "store".

This miscellaneous collection of cases discusses restrictive covenants in deeds, variously phrased types of statutes, and ordinances. There is considered the meaning of such words and phrases as "store", "merchant", "merchandise", and "mercantile purpose". The businesses involved include filling stations, public garages, automobile accessory stores, and the retail sale of goods on a plantation. Many of these cases are irrelevant because there is no contention here that gasoline and other petroleum products are not "goods, wares or merchandise of any kind."

The cases of *Mellitz v. Sunfeld Co.*, 103 Conn. 177, 129 Atl. 228, and *Abbott v. Steigman*, 263 Mass. 585, 161 N. E. 596, are of the same general type as the *Gunther* case, *supra*, in that they involve restrictive covenants in deeds. In the *Gunther* case, for example, the court held with reference to the erection of a service station:

> "That such use was for the purpose of trading and came within the designation of a store *within the meaning of a clause restricting the premises to residential purposes* can hardly be doubted." (Italics ours.)

Where the court is confronted with the necessity of distinguishing between business and residential uses, there can be no doubt that the operation of a filling station is a non-residential use. The controlling considerations in such cases are far different from those which control statutory construction. Where the terms "mercantile" and "store" are used in their ordinary acceptation to differentiate one type of business from others, the building restriction decisions are of no value as precedents.

The ordinance in *City of Troy v. Harris*, 102 Mo. App. 51, 76 S. W. 662, contained the following broad provision: "Every person who shall deal in the selling of goods, wares and merchandise *at any store, stand or place* * * * shall be considered a merchant and take out license therefor." The inapplicability of this decision to the case at bar seems obvious. Likewise, in the case of *Craig v. Pattison*, 74 Miss. 881, 21 So. 756, no reference was made to a dictionary, nor was it necessary because it appears from the opinion that the statute itself employed the broad definition that a "store" is "*a place* where goods are sold."

We admit the proposition laid down in *Buchanan v. Louisville Coal & Coke Co.*, 98 W. Va. 470, 127 S. E. 335, which is discussed at page 60 of appellant's brief. If a statute assigns a "definite meaning" to a word, resort to extrinsic evidence *is* unnecessary. The very point at issue here is whether the legislature has assigned to the word "store" the so-called dictionary meaning or the popular signification of the word.

There are substantial *reasons* why the public mind has not included gasoline service stations or filling stations in the

general term "stores". One reason is the character of the station itself.

The appearance and physical attributes of a service station are so different from those of a store as to completely justify the distinction in popular appellation. A typical service station consists of a parcel of land, upon which there has been laid a concrete surface. A small building, usually not larger than twenty feet square, is constructed thereon, chiefly for office use and for the convenience and comfort of the employees. Somewhere upon the concrete surface there are installed most prominently the upright pumps for refueling motor vehicles, also an automatic lift or a pit for the greasing and oiling of such vehicles, two or more underground tanks for the storage of gasoline, an air compressor and air connections for the inflation of tires, oil and grease tanks, water services, and incidental apparatus for the greasing and oiling of cars and the repair of tires. The concrete surface is divided into runways so that the operators of vehicles can drive up to the pumps or pits. (R. 10-15, 80-81, 152.)

While these physical differences go far to distinguish a service station from the popular mental picture of a "store", they are also pertinent to a proper understanding of the very language of the statute. Section 8 defines a "store" as a "store" or "mercantile establishment" *in which* goods, wares or merchandise are sold. The licensee is required to display his license in a conspicuous place *in* the store. There is nothing ambiguous or uncertain about the meaning of the word "in" or the expression "in which". These terms are not synonymous with "at", "near", "about", or "outside", yet the record shows, and it is judicially known, that gaso-

line furnished at a service station is not sold *in* any "store." We do not urge in this connection that this case should turn upon the difference between the word *"in"* and some other term which might have described more exactly the conditions at a service station. The point goes only to this: It appears from the use of the word "in" and the expression "in which" in connection with "stores" that *the legislature had in mind the same kind of establishment that comes to the mind of the average person when he uses or hears the word "store" in ordinary conversation.*

In this particular the West Virginia statute is even clearer than the Wisconsin act. The latter defines "stores" as "two or more stores or mercantile establishments *where* goods, wares, or merchandise are sold." If a filling station, which transacts its business at the automobile of the customer, is not a *store where* goods are sold, *a fortiori,* it is not a *store in which* goods are sold.

The language of the Act here in question may profitably be compared with that employed by the legislature of West Virginia in another statute where it actually intended to deal with service stations. Code of West Virginia, ch. 11, art. 14, sec. 2, lays a specific license tax upon "each filling station or place of business in this State *from which* gasoline is sold at retail" and upon "each distributing station or place of business *from which*" gasoline is sold for re-sale or distribution. Commenting upon this, the district court said (R. 268-269):

> "It is to be noted that here where the legislature was plainly dealing with the particular subject matter of filling stations it appropriately used precise words which can leave no doubt as to the meaning, and in view of this precise particularity it is not rea-

> sonable to construe the general language of the 'Chain Store Act', relating to a subject matter of different popular conception, to be inclusive of the particular subject matter so precisely described in other legislation."

There are other vital differences between a service station and a store. In a customary sale in a store, the transfer to the buyer effects no change in the characteristics of the goods purchased. Filling stations are designed for the servicing of automobiles *in operation*. Cars require motor fuel, oils and greases in order to run, and they also require at times the repair or replacement of tires, batteries and other accessories. These are usually emergency jobs and must be taken care of at the roadside service station before the motorist can proceed on his way. They can not be provided for in advance. Essentially the situation of the motorist is comparable to that of the man who purchases a meal in a restaurant, or the driver of a team who has his animals fed at a livery stable. The distinction between commodities so purchased and those purchased at an ordinary store is that the fuel and lubricants purchased at a filling station are not handed to the purchaser, but are *placed at once in motor vehicles* for immediate consumption. They usually are not transported elsewhere for disposition or use.

This difference in the service rendered at a filling station and in the transaction of selling and purchasing which takes place at an ordinary store unquestionably is a substantial basis for the popular conception which dissociates filling stations from "stores". Indeed it is responsible for the distinctive names "filling station" and "service station" which commonly identify such places. A service station is a place where gasoline and oil are *applied to cars*. A "store"

which merely sold and delivered such motor supplies to the customer would receive little or no patronage in this country, though it is known that in certain foreign countries gasoline and oil are customarily so sold. We *demand* the incidental service which characterizes the American roadside station, and differentiates it from a place of mere merchandising.

Some insight into the aim and spirit of this Act, as written, is afforded by noting the trend of public thought on the chain store question generally. Reliable sources of information are the reports of the Federal Trade Commission on chain store operations (Senate Document No. 31, Seventy-second Congress, 1st Sess. entitled "Scope of the Chain Store Inquiry"; Senate Resolution No. 224, 69 CONG. REC. 8522, Seventieth Congress, 1st Sess.), the chain store statutes throughout the country, and the approval by all courts, state and federal, of the legislative determination expressly to exclude service stations from such statutes. The service station business is carried on very much in the same manner everywhere, and this material shows how prevalent is the belief that multiple service stations should not be subjected to this type of tax measure, and do not fall within the reasons for such legislation.

Commenting upon this situation, the district court said (R. 269-70):

> "The essential difference between filling stations and stores generally is not only well marked in popular understanding but has been judicially expressed in recent cases by the courts. * * * And in some cases the contention has been submitted that the exclusion of filling stations from the incidence of general chain store legislation vitiates the Act in its constitutional requirement of equality of operation. But this contention has been rejected."

The district court referred particularly to the cases of *Southern Grocery Stores v. South Carolina Tax Commission*, 55 F. (2d) 931, 933, and *Liggett v. Lee*, 288 U. S. 517, 538. In *Liggett v. Amos*, 104 Fla. 609, 141 So. 153, the Supreme Court of Florida said "filling stations are *inherently different* from ordinary retail stores." On appeal, this Court justified the exclusion of filling stations on the ground of the state's power to impose varying taxes on "different trades and professions." In the *Southern Grocery Stores* case, *supra*, JUDGE PARKER said:

> "Such filling stations are *quite distinct* from ordinary stores or mercantile estbalishments. Of course, if the operator of a filling station should operate a store or mercantile establishment in connection therewith, such stores would unquestionably be subject to the tax prescribed by the statute." (Italics ours.)

The appellant (Brief, 64-5) suggests that the language in these opinions is "susceptible of the interpretation that filling stations were at least impliedly recognized as stores, which but for the specific exemptions would have been included within the provisions of the respective acts." While the approval of an exclusion of filling stations is not necessarily an inferential holding that they cannot be included expressly in such acts, yet the clear recognition in these cases of a distinction, inherent and popular, between ordinary stores and filling stations is at least persuasive of our view as to construction. The appellant takes one sentence out of its context from the opinion in the *Southern Grocery Stores* case and bases his comment thereon. He does not refer to that portion of the opinion quoted above.

The argument which appellant makes in this connection was disapproved by the Supreme Court of Idaho in *J. C.*

Penney v. Diefendorf (Ida. 1934, rehearing denied) 32 P. (2d) 784, 787-788. After referring to the decision of the Wisconsin court in the *Wadhams* case, *supra*, the Idaho court said:

> "The provisions contained in sections 7 and 8 of the act excluding, by classification, gasoline filling stations need not necessarily come within the rules of law applicable to exemptions from taxation. Such provisions are in the nature of legislative construction of the classification for taxation purposes intended to be made by the act itself. A gasoline filling station may or may not be subject to the tax, depending upon the fact as to whether such a station is operated in connection with, or as a part of, a store or mercantile establishment as defined by the provisions of this law. * * *
>
> "Appellant argues, however, that the very fact that in section 8, in which is defined the term 'store,' it is provided that gasoline filling stations should not come within such term, it is obvious that the legislature had in mind that gasoline filling stations, under the definition, were 'stores'. It does not appear to us that such an inference can be logically drawn from the provisions, as contended for, rather that the legislature had in mind that gasoline filling stations are not 'stores' as the term is generally and ordinarily used and understood, and in order to avoid any question such as arose in the Wisconsin case, where filling stations were not specifically excluded, specific provision was made to exclude the same from the classification of stores. The reasonsoning used by the Wisconsin court seems most persuasive and logical. No one would contend that if a person was asked to stop at the first store on the right-hand side of a business street in the city, that such party would stop at a shoe-shining parlor. Yet such a parlor might sell some shoe strings and shoe

polish, all of which might be considered as goods, wares and merchandise. See the very recent case of Standard Oil Company of New Jersey v. Fox (D. C. S. D. W. Va.) 6 F. Supp. 494, decided March 1, 1934, following the Wisconsin rule and giving the most cogent reasons why gasoline filling stations should not be included within the classification of general commodity chains. But considering the provision excluding gasoline filling stations, as creating a classification thereby granting an exemption, we believe such classification is absolutely justified and valid under the authorities."

After considering and approving the decision in the *Wadhams* case, the district court said (R. 266-8):

"There are other, and, in our view, even more persuasive considerations which lead to the same conclusion. We are here construing a statute which is familiarly known as a 'chain store act', a type of legislation which now exists in some nineteen states and in recent years has been considered in numerous judicial decisions. The essential principle of these Acts is to impose taxation in the form of license fees for the privilege of conducting stores, on a graduated scale, dependent upon the number of units or stores operated or controlled under one management. The type of business enterprise affected by such statutes is well identified in the public mind, but it is reasonably clear that the characteristics which serve to classify 'chain stores' as such, as distinct from ordinary stores, do not apply to various other business enterprises involving control of multiple units. Thus a chain of hotels in one or more states has a similar feature of unified ownership or management but has never been thought to be within the provision of these chain store acts although literally also they are places at which goods, wares and merchandise are sold. Similarly it may be said that filling stations

meet the needs of the touring automobiles in the same general way that hotels and restaurants provide necessities for the traveler. The roadside filling or service station is the modern substitute for the livery stable in connection with an inn or tavern in days of travel by stagecoach. The dominant characteristic of the business is the 'filling' of automobiles with gasoline, oil and water, and the rendering of 'service' to the motorist—hence the name which aptly describes the business. Such transactions are in public thought quite distinct from the purchase of goods at an ordinary store.

"Probably the greatest objection to chain stores is their tendency to eliminate the individual storekeeper, an occupation of long standing; but this cannot be said to be true of the chain of filling stations which is itself a feature of a new industry, filling a new public need, and being itself as much a pioneer in the new development of the automobile and petroleum industry as is the single independent station.

"The filling or service station is thoroughly identified in the popular mind as a thing which is sui generis and the gasoline industry, including particularly the sale of gasoline at retail, has been the subject of separate legislation, it is safe to say, in every state of the Union. Legislation affecting chain stores and legislation affecting service stations are separate and distinct subject matter each of which which respectively has had its own course and, so far as we are advised, they have followed parallel lines which do not intersect in common thought and understanding. There has been no body of public thought or literature coming to our attention which has identified the chain of filling stations with the characteristic features commonly associated with the popular conception of chain stores. And the somewhat elaborate stipulation of facts in the case very clearly leads to the conclusion that the combined characteristics which feature the typical chain store

system and which have served as a basis for special classification for purposes of taxation do not inhere in multiple ownership or control of filling stations as compared with individual or independent ownership and operation of a single filling station. Therefore in searching for the meaning of the legislative definition of the word 'store' as used in this 'Chain Store Act', it is not reasonable, in our opinion, to determine that the typical filling or service station is a store as the term was defined in this 'Chain Store Act', in the absence of language which plainly indicates from its context that such stations were intended to be included."

3. The Incidental Sale of Accessories Does Not Change the Controlling Character of Appellee's Service Stations.

At appellee's 101 owned and operated stations it has offered for sale during the past few years "automobile tires, batteries, spark plugs, windshield wiper blades, and a limited variety of other automobile accessories and supplies." (R. 147-148.)

The gross revenue from the sale of such accessories and supplies has been relatively very small, amounting to but 5.6% of the total revenue from these company-owned stations for the period of three and two-thirds years from 1930-1933. In the year 1932 the sales of such articles amounted to 6.3% of total receipts at such stations. (R. 148.) Appellant terms these sales as "appreciable" and infers that they tend to characterize the stations as "stores".

The district court, in rejecting this contention, said:

> "It is apparent also from the facts that sales of these articles are incidental only and are substantially

> for service to automobiles en route rather than the vending of merchandise in the usual way. This small incidental sale of articles of merchandise is not sufficient in our opinion to convert a service station, otherwise not subject to the Act, into a store within the Act any more than the incidental sale of cigars and newspapers and flowers in the lobby of a hotel makes the latter a store as distinct from a hotel or restaurant. It is the dominant nature of the business which characterizes it for purposes of taxation. * * * Of course, as was pointed out in the Wadhams Oil Company case, it may become a question of fact with regard to any particular station whether by reason of the extent of its sale of accessories or otherwise its dominant characteristic has become that of a store rather than a mere service station." (R. 275-276.)

Supporting authorities are: *Fisk Rubber Co. v. Hinson Auto Co.*, 168 Ark. 418, 270 S. W. 605; *Cesar v. Virgin*, 207 Ala. 148, 92 So. 406; *Swanson v. DeVine*, 49 Utah 1, 160 Pac. 872; *New Galt House Co. v. City of Louisville*, 129 Ky. 341, 111 S. W. 351, 352; *Carney v. Hamilton*, 89 Miss. 747, 42 So. 378; *Planters' Lumber Co. v. Wells*, 147 Miss. 279, 112 So. 8; *Piedmont Oil Co. v. Kennedy*, 165 Tenn. 375, 54 S. W. (2d) 958; *Debenham v. Short* (Tex. Civ. App.) 199 S. W. 1147, 1148; *Wadhams Oil Co. v. State* (Wis.) *supra*, 245 N. W. 646, 649.

There can be no reasonable doubt as to the basic nature of the appellee's establishments. Without exception, they transact predominantly a service station business, and are not "stores" in popular acceptation. At its 848 leased and vending privilege outlets, appellee is engaged exclusively in the sale of petroleum products. The commission agency agreements, under which such stations are operated, and to

which appellant refers at page 66 of his brief, specifically limit the agency relationship to "gasoline and other motor fuels, motor oils, greases and other petroleum products." (R. 53). Frequently, the "agent" sells non-petroleum products and accessories sold to him by the appellant and by other companies, but as to such transactions the agreements state that the "agent" acts "upon his own personal account * * * not in the name of, on behalf of, or for the account of" the appellee. (R. 53-4, 148.) The stipulation (R. 148) states that the agents may buy their supplies of non-petroleum products either from the appellee or others, and that when purchased from the appellee they are acquired under the terms provided in certain printed forms exhibited in the original record. The import of all of which is that where the agents handle tires, accessories, etc., they do so in the same capacity and manner as any other dealer. Appellant did not concede this conclusion in the stipulation, but the agreed facts make the situation clear. In 1932 the sales value of all tires and tubes sold by appellee to these outlets was but $97,280.55. (R. 171-172.)

At the vending privilege outlets the appellee is not only engaged exclusively in the sale of petroleum products, but the appellee's lessor or agent in the sale of these goods is actually conducting some other principal business on the premises. The sale of appellee's gasoline, oils and greases is usually incident to the other business so conducted. On the basis of the same judicial authority which holds that the sale of non-petroleum products would not convert a filling station into a "store", so here the incidental sale of petroleum products by a coal company, garage owner, or country merchant does not change the business of a garage or of a

coal company or of a country store into a "store" of the appellee for the sale of gasoline.

The names of many of the vending privilege outlets (R. 46) disclose the true character of many of these places. It occasionally happens that more than one oil company maintains a leased or vending privilege outlet at the same location, in which event there is the spectacle of the principal business assessed with a nominal tax of $2.50, and each of the companies whose pumps are there installed assessed with a very substantial charge, dependent upon the number of other stations and outlets maintained by it in the state.

4. The Construction of the Language, as Written, is Sufficiently Clear and Certain to Render Unnecessary Resort to the Legislative History of the Act.

After the passage of House Bill No. 112 by the house of delegates, and upon the second reading in the senate, an amendment was proposed which would have provided "that the term 'store' shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products." (R. 119.) It was defeated by a vote of 15 to 13, with two members absent and not voting. (R. 122.) The district court attached no clear import to the defeat of this amendment, and regarded the language of the statute as sufficiently clear without reference to such uncertain legislative history. (R. 275.)

Authorities cited by the appellant tend to support the view that the rejection of an amendment may be considered in construing the doubtful language of an act. But in *Finlayson v. Shinnston*, 113 W. Va. 434, 168 S. E. 478, 480,

cited by appellant, the reference to an earlier rejected draft of a proposed constitutional amendment was a *mere make-weight* in the decision of the court which was also grounded on the application of the doctrine of *enumeratio unius est exclusio alterius* to the language written in the adopted constitutional amendment. The court there held primarily that the language of the constitutional amendment, as adopted, was so "plain and unequivocal" as to leave "no room for interpretation".

Where the language used in an act has a plain and obvious meaning, the settled rule of the Supreme Court of Appeals of West Virginia, and of other courts, is that reference to legislative history, such as debates, committee reports, and proposed changes considered or rejected, is neither necessary nor proper. *U. S. v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83; *Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, 589; *Kelleher v. French*, 22 F. (2d) 341, 346; *State v. Harden*, 62 W. Va. 313, 330, 349, 350; *Lanham v. Buckhannon*, 97 W. Va. 339, 125 S. E. 157; *Gissey v. Board of Education*, 105 W. Va. 429, 433, 143 S. E. 111; *Kain v. Ashworth*, 119 Va. 605, 89 S. E. 857; 59 C. J. 953-7.

The Wisconsin court in the *Wadhams* case, *supra*, was dealing with a background of legislative history very similar to that involved here. At its regular session, the legislature of Wisconsin had rejected a chain store license tax statute which contained a clause specifically excluding filling stations from the operation of the act. A few weeks later at an extraordinary session it enacted the statute which came before the court for review. The State in that case asked for a rehearing of the original decision, and filed "a

lengthy argument with respect to the intent of the legislature." The court, however, adhered to its original view, stating *inter alia*: "The question is not what the legislature intended, but what did it mean when it used the language quoted." (246 N. W. 688.)

When the meaning of a statute is being considered, resort is first had to the language itself. The accepted principle of construction looks to the ordinary, popular sense in which words are used as the meaning to be accorded to the words of a statute. Common usage ascribes to the word "store" a signification which is not inclusive of "filling stations". That signification is so plain and certain as to require no resort to secondary sources like the rejected amendment in question, which, if considered at all, serves only to create doubt. The legislative history of an act is never more than a matter for consideration, and the weight to be attached to it depends upon the circumstances of each situation. In this case, the implication from the rejection of the amendment by one branch of the legislature is by no means of clear import, and since no definite inferences may be drawn from such action, it must be disregarded.

The appellant's claim with reference to the rejected amendment involves an assumption as to the motives and intentions of those who voted thereon. The assumption is that some members of the senate considered that the word "stores" included filling stations. In view of the express definition actually adopted is it not more reasonable to assume that members voted to reject the amendment as being unnecessary or superfluous?

Moreover, the proposed amendment would have excluded from the operation of the Act only those stations which dealt *exclusively* in petroleum products. By implication the amendment probably would have extended the tax to filling stations which carried automobile accessories, in however limited quantities. It can be very safely assumed that such extension was not favored, the fact being that a majority of filling stations in the state do handle limited varieties of articles other than gasoline and oils. Those who held this view no doubt preferred not to becloud the common meaning of the term "stores" by impractical and artificial statutory phraseology. How can the rejection of the amendment by two votes be interpreted as a clear indication that the Senate *meant to tax filling stations,* including those stations dealing incidentally in non-petroleum products, in the face of the fact that the rejected amendment would have accomplished that very result?

It is by no means clear that those who voted to reject the proposed amendment were voicing a specific intent to impose a tax upon filling stations. They may or may not have intended to bring about a result exactly opposite to that proposed by the amendment. If the rejection of an amendment were inevitably and conclusively considered to evidence such an intent, the possibilities arising simply from the offering of an amendment, even if it were rejected, would be tremendous. Resort to such tactics would then greatly embarrass the consideration of such proposals upon their merits. Where the possibility of confusion as to purpose and intent has been shown to exist, the courts have not been hesitant in refusing to give any weight to the rejection. Indeed, in certain cases they have not refrained from giving a statute the same effect *as if the rejected amendment had been adopted.*

In *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 317-318, this Court had occasion to consider the legislative history of the Sherman Anti-Trust Act of 1890. When that measure was before the House an amendment was adopted extending its provisions to "any contract for the purpose of preventing competition in the transportation of persons or property." When the bill reached the Senate, the amendment was further revised to apply to "any such contract as tended to raise prices for transportation above what was just and reasonable." Subsequently, both amendments were dropped from the act. Nevertheless, this Court found that the act applied to transportation contracts. The decision rested upon the language of the statute itself, because the debates in the Congress revealed such a variety of views that it was impossible to determine "what were the views of a majority of the members of each house in relation to the meaning of the act."

In *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, the legislature had rejected an amendment limiting certain provisions to domestic insurance companies. Yet the court held that the statute was so limited, and said:

> "This argument assumes that the only reason moving members of the legislature to oppose such amendment was that they agreed with the attorney general in his construction of the act, and desired the act to stand as he construed it. But how can we know that this assumption is true? While some members may have acted from that motive, is it not just as reasonable to suppose that others differed with him in his construction of the law, and voted against the amendment on the ground that it was unnecessary and a needless waste of time to pass an amendment in order to make the law mean what they supposed it already meant? The settled rule,

> established by the highest authority, is that but little weight should be attached to expressions of individual members of the legislature, or to the fact that certain amendments were rejected. Aldridge v. Williams 3 How. 24, opinion by Chief Justice Taney; Black, Interp. Laws, 226." (51 S. W. 633, 634.)

In *Murray Hospital v. Angrove* (Mont.) 10 P. (2d) 577, the court found that injuries not sustained in course of employment were included within the terms of hospitalization contracts despite the rejection of an amendment which would have expressly included them. The court said:

> "It may be that the attempt was made merely for the purpose of overcoming adverse rulings by the clarification of the act, and it is as reasonable to presume that the House, in rejecting the amendment, determined that it was so 'plain, simple, direct and unambiguous' as to require no interpretation or clarification, as that the House refused to 'change' the law."

Other cases present the same situation. In *Dist. of Columbia v. Washington Market Co.*, 3 MacArth. (D. C.) 559, *aff'd*, 108 U. S. 243, it was said:

> "This amendment was rejected; but it may be urged with equal plausibility, on the one hand, that congress rejected it because it determined to vest the final power in the city authorities; and on the other, that the reason for the rejection was the belief that the law only authorized an inquiry or preliminary treaty about the land. We are therefore forced to examine the language itself, unassisted by extraneous aids."

An interesting analogous situation is presented in *Murdock v. City of Memphis*, 20 Wall. (U. S.) 590, 618. In

amending the Judiciary Act, the Congress in the Act of 1867 omitted the provision of the Act of 1789, which expressly restricted this Court, in cases coming from state courts, to reversals based upon errors arising on federal questions and appearing on the face of the record. Counsel, therefore, argued that pursuant to the amendment the Court was empowered to enter reversals based on non-federal questions. But MR. JUSTICE MILLER said, for the Court, that the precise motives which induced the omission of this clause could not be ascertained with any degree of satisfaction, and, mentioning several possible reasons therefor, he concluded that there was "no sufficient reason for holding that Congress, by repealing or omitting this restrictive clause, intended to enact affirmatively the thing which that clause had prohibited."

We do not suggest that legislative history is never of evidential weight. In some instances, there may be ambiguity of such character that the record of amendments and the like may be of peculiar value as an aid to interpretation. But, where, as here, the language of the statute is of plain import, considered in the light of the settled principle which accords to statutory language its ordinary and popular meaning, and where different grounds are reasonably assignable for the rejection of the amendment, the legislative history has no probative value. The rejection of the amendment here is wholly consistent with the reasoning that members of the senate, when they used the word "store", intended it to have its ordinary every-day significance, and did not conceive of it as extending to a filling station. Many senators must have realized the inexpediency of writing into the Act an express legislative construction, excluding filling stations, and so inviting attack in the courts, however groundless,

based on the alleged invalidity of such exclusion. Again, the adoption of the amendment would have extended the tax to filling stations dealing in non-petroleum products, however slightly. It is most reasonable to assume that many did not favor such discrimination between stations dealing exclusively in petroleum products and those handling other commodities incidentally. The coordinate branch of the legislature, the House of Delegates, was not consulted on the amendment. Without the amendment, the language of the statute was clear. It included "stores" only.

5. The Act Must Be Construed Strictly in Favor of the Taxpayer.

The probative value of the rejected amendment, which has just been discussed, could be considered only if the language of the Act were of doubtful meaning. And, even if it were doubtful, which it is not, the first applicable rule of construction would be that ambiguities in a taxing statute must be resolved in favor of the person upon whom it is sought to impose the tax. See *Wadhams Oil Co. v. State, supra,* 246 N. W. 687, 688, (where the rule is cited only incidentally).

This rule is particularly applicable where the taxing statute includes penal provisions. 25 R. C. L. 1081, title Statutes, sec. 301; *Gould v. Gould,* 245 U. S. 151, 153; *Old Colony R. Co. v. Com'r of Internal Revenue,* 284 U. S. 552; *Alyea-Nichols Co. v. U. S.,* 12 F. (2d) 998; *Fry v. Ronceverte,* 93 W. Va. 388, 394, 117 S. E. 140; *Kloss v. Commonwealth,* 103 Va. 864, 49 S. E. 655.

The rule of strict construction applies peculiarly to the statute involved herein. It is provided in the Act that a

violation thereof shall constitute a misdemeanor, and that any person, firm or corporation violating any of its provisions, upon conviction shall be fined not less than $25 nor more than $100, and that each and every day during the continuance of such violation shall constitute a separate and distinct offense. In its bill of complaint appellee averred that under the appellant's rulings it was subject potentially to a maximum penalty of over $100,000 per day for its alleged continued violation of the Act. (R. 5-6.) These penalties are without precedent in the revenue laws of the state. No statute relating to property taxation, or to occupational taxes, contains any such drastic penalties as those here involved.

Not only is the present statute a revenue act containing drastic penal provisions, but it is very definitely a limitation upon the common right of engaging in trade and business. Statutes of this character are construed strictly in favor of the taxpayer and against the taxing power. 59 C. J. 1131; *Combined Saw & Planer Co. v. Flournoy*, 88 Va. 1029, 14 S. E. 976.

6. The Taxing and Licensing of Service Stations as "Stores" Would Violate the Presumption Against Multiple Taxation.

The practical effect of applying the "store" tax to service stations and to bulk distributing plants is to impose a double license tax on the same privilege.

This Act is not a taxing measure alone; it is specifically a licensing statute. A particular form of application is required of each "store" owner or operator, and the license

must be displayed *in* each "store". Without this license it is unlawful for anyone to operate a "store" in the state.

But with respect to the operation of bulk plants and service stations, an owner or operator is governed by a different statute, which requires the issuance of a license by the tax commissioner for the operation of all such establishments. CODE OF WEST VIRGINIA, ch. 11, art. 14. No reference to this statute appears in House Bill No. 112.

There has been a special excise tax on persons selling gasoline in the state since 1923 (Acts 1923, ch. 34). The Legislature of 1923 imposed a license tax of $1.00 and $5.00 upon filling stations and distributing plants, respectively, and a gallonage tax of 3 cents per gallon. The Legislature of 1925 increased the license taxes substantially to $5.00 and $25.00, and the gallonage tax from 3 cents to 3½ cents. Chapter 18 of the Acts of 1927, by its title, imposed an occupational tax at flat rates upon distributors and retail dealers in gasoline, and a special excise tax upon such persons based on quantities of gasoline sold, purchased or used in the state. The present statute is a reenactment of the 1927 law. Section 2 (CODE OF WEST VIRGINIA, art. 14, ch. 11), imposes an annual license tax of $5.00 for each "distributing station or place of business or agency . . . at or from which gasoline is sold for resale or distribution or at which gasoline is produced, refined or compounded" and $1.00 for "each filling station or place of business from which gasoline is sold at retail." The section also provides that "the privilege granted through the payment of the annual license tax shall be conditioned upon the licensee complying with the requirements of this article pertaining to the filing of statements and the payment of the excise tax imposed by section three hereof."

Section three shows upon whom the excise tax is imposed:

> "*There is hereby imposed, upon every person who is a distributor, retail dealer or importer under the terms of this article, an excise tax based on the quantities of all gasoline sold, purchased or used in this State . . . equivalent to four cents per gallon thereof* . . . A distributor shall use as the measure of the tax the gallonage sold for whatever use in this State . . . and the gallonage used by him in motor vehicles operated in this State; a retail dealer shall use as the measure of the tax the gallonage purchased or obtained by him, and an importer shall use as the measure of the tax the gallonage purchased by him for use in motor vehicles to be operated in this State.
>
> "The special excise tax imposed by this article shall be paid by the person first selling, or using in this State the gallonage of gasoline which under this article shall form the measure of such tax; but in no case shall any such gallonage be used more than once in determining taxes due thereunder. . . .
>
> "The excise tax imposed by this article shall accrue from the date of sale or purchase of the gasoline, whichever accords with the method of reporting required by this article, or conforms with the election of the taxpayer in the case of distributors, and the penalties imposed . . . shall accrue from the date they become due and payable, *and such taxes and penalties shall be and remain a charge and lien upon the properties, both personal and real, of the person liable to pay such taxes and penalties,* superior to any lien created after such taxes and penalties accrue; and no title shall vest or be transferred as to any such property, except subject to the lien for such taxes and penalties, and no such property shall be transferred or delivered, in whole or in part until after payment to the tax commissioner is made of the amount of such taxes and penalties due." (Italics ours.) (R. 105, 108.)

By this statute the legislature has made it illegal for any person to operate a filling station or bulk plant without complying with its conditions. The tax is a license fee or occupation tax imposed as a condition precedent to the privilege of engaging in the business.

There is this situation: chapter 11, above quoted, imposes taxes on filling stations and bulk plants at the respective rates of $1.00 and $5.00, together with a flat-rate gallonage excise tax of 4 cents. House Bill No. 112 levies a license tax of $2.00 upon every first "store" and progressively graduated taxes upon additional "stores" in a single system. Under chapter 11 the state is paid annually a license tax at flat rates for the operation of all the bulk plants, filling stations and leased and vending privilege outlets comprising the very system upon which the appellant has sought to assess to the appellee the "stores" tax. In practical effect chapter 11 imposes a tax upon the distributing outlets for appellee's petroleum products, proportioned according to their number. The only difference between that exaction and the present "stores" tax is that the rates of the latter are progressive rather than proportional.

There is a very strong presumption against any interpretation of House Bill 112 which would result in a multiple license and tax upon the privilege of operating the same establishments. *Tennessee v. Whitworth*, 117 U. S. 129, 137; *State ex re Dillon v. Graybeal*, 60 W. Va. 357, 55 S. E. 398. The presumption is equally applicable to non-property taxes. *Wingfield v. South Carolina Tax Comm.*, 147 S. C. 123, 144 S. E. 846; *Quick Service Tire Co. v. Smith*, 156 Tenn. 96, 299 S. W. 807; *N. Y .Cent. R. Co. v. Stevenson*, 277 Ill. 474, 115 N. E. 633; *Britt v. Cook*, 157 Tenn. 54, 6 S. W. (2d) 322; *In re Barbour's Estate*, 185

App. Div. 445, 173 N. Y. S. 276, *aff'd*, 226 N. Y. 639, 123 N. E. 854. It has been definitely applied to the attempted duplication of a franchise or license tax in *Greene v. E. H. Taylor, Jr. & Sons*, 184 Ky. 789, 212 S. W. 925. The same rule has been applied to attempts to exact multiple license fees. 21 Am. & Eng. Ency. Law (2d ed.) 814; *Walker v. New Orleans*, 31 La. Ann. 828 (attempt to collect license fee for vehicle plates or tags in addition to license tax imposed upon the operation of the vehicles); *City of Newport v. Fitzer*, 131 Ky. 544, 115 S. W. 742 (attempt to collect vehicle license tax in addition to peddler's license giving right to use such vehicle); *Atlantic City v. Hemsley*, 76 N. J. L. 354, 70 Atl. 322 (attempt to levy license tax upon the keeping of sleeping rooms in addition to license tax on hotels).

Just as the general tax for the privilege of using a vehicle on the highways was held not to apply to one who had already paid the tax for the privilege of peddling with a wagon; just as in *Bell v. Watson & Bro.*, 2 Lea. (Tenn.) 328, a tax for the privilege of running hacks for profit was held not to include one who had already paid the tax for the privilege of keeping a livery stable; so here, the presumption against double taxation excludes from the general tax on the privilege of operating a "store" one who has already paid the tax for the privilege of operating a filling station. A number of the authorities cited invoke the presumption where the language of the subsequent general statute might *literally* include the particular business which has already been specifically dealt with; *a fortiori*, the subsequent general enactment cannot be so applied where it does not *by its terms* cover the particular business or occupation.

The presumption has been applied to the gasoline distribution business. In *Gulf Refining Co. v. Chattanooga*, 136 Tenn. 305, 190 S. W. 463, the plaintiff, a vendor of oils and gasoline, was liable for a privilege tax for conducting that business. The city also attempted to impose a *merchants privilege tax* on the same business, but the court applied the presumption, and invalidated the attempt to require the plaintiff to "pay two taxes for the same privilege as that of selling oils and gasoline in the state of Tennessee." In *Piedmont Oil Co. v. Kennedy*, 165 Tenn. 375, 54 S. W. (2d) 958, the court, in avoiding a construction that would involve double taxation, held that one who had paid the tax for operating a filling station was not liable for a tax on oil depots. So here, since the appellee is liable for a specific privilege tax for operating its filling stations and bulk plants, it should not be held to be within the general "store" license statute. In the absence of express language, it is not to be presumed that the legislature intended to tax the same privilege twice.

The appellant (Brief, 36-37) seeks to minimize the amount of taxes paid by the appellee in the state, mainly by treating the gallonage tax as "an excise tax paid by the consumer." He cites *Gregg Dyeing Co. v. Query*, 286 U. S. 472, which involved a wholly different type of gasoline excise statute. It was designed to supplement an existing statute which imposed a tax in terms on dealers in gasoline. The later enactment was intended to reach gasoline, imported by large consumers, which was tax-free under the other statute. Every section of the West Virginia statute contains definite language indicating that the license is required, and the (gallonage) tax is imposed, for the privilege of operating filling stations and bulk plants. As the district court said (R. 269):

> "While in practical effect this tax is passed on to the consumer it nevertheless is a tax primarily on the vendor and furnishes a very material part of the whole of the state revenues, as is true in many other states."

The courts have held, under similar statutes, that consumers could not raise the question of the constitutional validity of motor fuel tax statutes, which,like the West Virginia statute, imposed the tax upon the dealer and distributor. *Williams v. Riley,* 280 U. S. 78. In *Central Transfer Co. v. Commercial Oil Co.,* 45 F. (2d) 400, at 402, it was well stated by the court that

> "Here . . . the tax is laid against distributors and dealers only. It is a matter of no legal importance, so far as concerns the matter presently at hand, whether or not the distributors and dealers pass the tax on to the consumer. It may be conceded, as a matter known of all men, that those against whom the tax is directly laid do ordinarily pass it on to the consumer. But this is a matter, not of law, but of business practice. True it is that the Missouri Motor Fuel Law, in section 30 thereof . . . requires a notice to be posted by a distributor segregating the price of the gasoline from the amount of the tax. But this does not preclude the dealer from selling gasoline at any price he may see fit. In effect, such a notice merely informs the purchasing public that the dealer is paying a tax of two cents on each gallon of gasoline sold. Such provision and such notice cannot be construed as shifting the tax from the distributor to the consumer, in the teeth of this statute, which in section 4 thereof . . . says: 'Every dealer shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two (2) cents for each gallon of motor vehicle fuels sold or dis-

tributed by such dealer in this state during such year.'"

If the taxes are unpaid, they become a lien on the properties of the dealers and distributors who are liable to the tax. If the money received by the appellee is lost or stolen, or if the amount charged to customers is uncollected, the appellee must nevertheless pay the tax, and its property is security therefor. The fact is that the service station business, through the taxes on motor fuels and motor vehicles, is already heavily taxed in West Virginia, and that fact has great pertinence in considering whether the legislature intended to include such stations within the operation of the chain store act.

The business of distributing petroleum products is bearing a tremendous part of the tax burden in this state. The tables in the record (R. 198, 200) indicate the extent to which the business is burdened directly, and indirectly through the fees imposed on the operation of motor vehicles. The first table (R. 198) shows that taxpayers engaged in this business, including refiners, wholesale distributors, and filling station operators, have paid their fair proportion of the gross sales tax, denominated a business and occupation privilege tax (CODE OF WEST VIRGINIA, ch. 11, art. 13, sec. 2). The record (R. 203) also shows that had the increases in the gross sales tax rates, provided by the tax act of 1933, been in effect in the preceding years, the appellee's gross sales tax would have been increased 89.46% in 1930; 81.38% in 1931, and 76.24% in 1932. This illustrates the tremendous increase in the rates of this tax.

From the second table (R. 200) computations have been made of the percentage relationship of the special taxes on

distributors of petroleum products and on the operation of motor vehicles to total state tax receipts. For the fiscal years from 1927 to 1933, it is found that 34%, 39%, 39%, 42%, 43%, 45%, and 47% of the state's entire revenue, respectively, came from motor vehicle and gasoline taxes and fees. For the fiscal year 1933, the gallonage excise tax alone constituted 26% of the state's entire revenue; and, in addition thereto, those engaged in this heavily taxed business paid their proportional share of all other forms of state taxation.

It has been judicially recognized that in recent years the business of distributing petroleum products has been singled out for tax exactions unparalleled in the field of legitimate business. More than once it has been stated by the courts that these special and unusual tax burdens warrant the exclusion of filling stations from taxes laid upon business generally, or justify the presumption that filling stations were not intended to be included. In the *Wadhams* case, *supra*, the Wisconsin court held that the Wisconsin motor vehicle fuel tax, which does not purport to be other than a "tax upon the owners and operators of motor vehicles" (sec. 78.01), afforded some support for the construction which the court placed upon the chain store statute on other grounds:

> "Considering this (chain store) statute generally in connection with other statutes relating to taxes, the legislature may well have thought that, having already imposed a sales tax of 5 cents a gallon upon the use of gasoline by the operators of motor vehicles, approximately 33 1-3 per cent ad valorem, the business was already baring its fair share of the tax burden."
>
> 246 N. W. 688-689.

Similar weight was attached in *Liggett v. Lee,* 288 U. S. 517, 538, to an existing Florida statute, which imposed a license and gallonage excise tax upon all dealers in gasoline, including operators of filling stations; other cases to the same effect are *Liggett v. Amos,* 104 Fla. 609, 141 So. 153; *Southern Grocery Stores v. South Carolina Tax Comm.,* 55 F. (2d) 931, 933; *J. C. Penney Co. v. Diefendorf* (Ida. 1934) 32 P. (2d) 784, 790.

As the district court points out, it seems most improbable that the legislature would have left to inference the inclusion of the principal taxpayers to be affected by the tax (R. 270). In the face of the presumption against double taxation, and in the light of the fact that the Act makes no mention of the business which, under appellant's interpretation, would be required to pay substantially all of the tax, the appellant's construction of the statute is not warranted either by judicial authority or by common reason.

7. The Act Does Not Apply to Appellee's Bulk Distributing Plants.

The district court did not pass specifically upon the appellee's contention with respect to its bulk distributing plants, but it made the following general observation:

> " . . . it (the appellee) operated 54 bulk or distributing plants, maintained principally as supply depots for the storage and distribution of petroleum products to the said service stations or dealers handling its products and to commercial and industrial consumers throughout the state. A relatively small quantity of petroleum products is sold on the premises of the bulk stations." (R. 242.)

The record contains a full statement of the character of bulk plant activities. (R. 12-13, 152-166.) These plants are strategically located at points accessible to water or rail facilities and to the trade. (R. 153, 163.) During the year 1932 approximately 23% of all deliveries of petroleum products from these plants in the state were made to appellee's owned and operated service stations, 43% to the leased and vending privilege outlets, and 33% to individual dealers and various industrial, commercial, and governmental consumers. So, in that year, approximately 66% of petroleum product deliveries from bulk plants went to appellee's own or agency stations. (R. 153.) Substantially all deliveries to commercial and industrial buyers were made under term contracts or pursuant to sales in the field by general salesmen who travel out of the branch office. The deliveries to the State are upon annual contracts made between the appellee and the several subdivisions or departments of the government.

The bulk plants are essentially storage depots or warehouses. If petroleum products were less bulky, fewer storage plants would be necessary. On the other hand, appellee would employ much the same traveling sales organization in the field. In other words, the 54 bulk plants are simply links in the system of handling and distribution.

The appellant points to the fact that about one-third of all gasoline sold by appellee is supplied from these plants to individual dealers and industrial consumers, and contends that, notwithstanding the fact that such deliveries are made against contract commitments previously obtained at the customer's place of business, the bulk plants are "places at which merchandise is sold." Whether the

appellee's contention in this respect is sound must be determined from the facts of its own business. Other companies may use their so-called bulk plants as branch offices, storage plants, and stations for the sale of products to the public like any ordinary service station. That is not the fact in the business of the appellee.

The physical make-up and operation of a typical bulk plant afford no basis for comparison with a wholesale "store" within the meaning of the Act. The description of the bulk plant in the record shows that it consists mainly of steel storage tanks for bulk products, a brick or steel warehouse for packed petroleum products, a pumphouse with power-unit installation for pumping the bulk products from railroad tank cars into the steel storage tanks, tank wagon loading platforms, and garages for the motor tank wagons and motor tank and barrel trucks. There is a wire fence enclosure. No provision is made for the display of products, or for the attraction or solicitation of business at the plant. There are no pumps or other vending facilities there. (R. 153.) Indeed, it is the fixed policy of the appellee to discourage the public from coming upon the premises.

The occasional sales made to persons calling at the appellee's bulk plants and carrying away products purchased are called "bulk at plant" sales. (R. 153, 162.) When a motorist runs out of gasoline near a bulk plant, he may come there for sufficient gasoline to proceed on his way. Sometimes a farmer comes to the plant for kerosene for his requirements. These infrequent accomodation transactions in which the buyer comes to the plant and makes a purchase do not characterize these bulk plants as "stores" any more

than the incidental sale of cigars makes a hotel a store. The authorities cited in discussing the sale of accessories at filling stations also sustain the position that the sale of an insignificant quantity of products on the premises of certain bulk plants, as described, does not convert these warehousing depots into "stores."

The appellee's business in West Virginia is carried on through branch offices, mainly through the branch office located at Charleston. The record shows that the management and sales effort are completely concentrated in the branch office organization, as distinguished from the bulk plant organization. Twenty general salesmen cover the entire state and contact the trade. Their employment, remuneration, and working directions emanate from the branch office. Their principal duty is selling, and the performance of that duty takes them directly to the customer's place of business. They employ chiefly an annual contract form in negotiating for business, in which are forecast the minimum requirements of the customer who places periodic orders against the commitment. The contract is executed by the customer and sent to the branch office by the general salesman for execution by the appellee's representatives. Ordinarily, the motor-tank salesmen only take and fill orders against such commitments previously obtained by the general salesmen. Contracts and orders are referred to the most accessible bulk plant for filling. All books of accounts are kept at the branch offices in Charleston, or Baltimore (Maryland), and lines of credit are established at those offices.

The appellee does not deny that it does a wholesale business in the state, but the mere fact that *deliveries* are initiated

from the bulk plants by tank-wagon or tank-car does not indicate that such wholesale business is *carried on at the bulk plants*, so as to make them subject to this tax. The inquiry is not whether appellee does a wholesale business, but whether such business is done *at the bulk plants*. Certainly, a wholesale furniture establishment with one central business office and showroom, but with three warehouses, would be taxable on one location, not four. The bulk plant is as distinct from a wholesale "store" as any ordinary warehouse. Sales effected away from the premises cannot bring these bulk plants within the scope of the Act. And, even though occasional orders may be taken at the bulk plants, the sales do not take place there. Delivery is made to the various classes of buyers by tank-wagon or tank-car. "Where the buyer transmits an order to the seller and, without the intervention of a carrier, the seller fills such order by a delivery personally or through his agent to the buyer at the latter's place of residence, the view is generally taken that the buyer's place of residence is to be deemed the place of sale . . . ." 23 R. C. L. 1254, Sec. 71.

Had the legislature intended to include these bulk plants, it might have designated them "oil depots," as has been done in other states in imposing a specific tax thereon, or it could have used some appropriate language such as it employed in the statute imposing a license tax on "each distributing station . . . at or from which gasoline is sold for resale or distribution." But looking beyond the mere inaptness of the language used to cover bulk plants, the rule of construction is applicable here that doubt must be resolved in favor of the taxpayer.

V. Conclusion

We have discussed the two prime questions with respect to the application of the Act to service stations and bulk distributing plants, namely, the question of constitutionality and the question of construction. In the end, the two interact, for, as the district court pointed out, a persuasive consideration for the construction which excludes service stations and bulk plants from the scope of the Act is that a grave question of the constitutionality of the Act (both federal and state) is thereby avoided. (R. 270-1.) *U. S. v. LaFranca*, 282 U. S. 568, 574; *U. S. v. Jin Fuey Moy*, 241 U. S. 394, 401.

The statute should not be given a strained construction so as to include the appellee's business or any particular units of it. Had the legislature meant to include service stations and bulk plants in the term "stores", appropriate and adequate provisions would have been written into the law to bridge the wide differences and distinctions, not only as between ordinary chain stores and multiple service stations, but also as between the different kinds of outlets for petroleum products. The legislature is bound to have known that service stations far outnumber any class of "stores", and the statute imposing an annual license tax on "filling stations" and "distributing stations", shows that the members were fully cognizant of language suitable to cover such places of business. Many courts have pointed out the obvious and inherent distinctions between "filling stations" and "stores"; yet there is nothing in the wording or in the substance of the Act which indicates an intent to assimilate these establishments into one taxable class. Appellant contends for an application of the statute, which, in our view, is both unconstitutional and unintended by the legislature.

In the district court the appellee asserted that the tax statute violated the constitution of West Virginia, *first*, on the ground that the act conflicts with the uniformity provision of that constitution, and, *second*, on the ground that "classification and graduation" with respect to the taxation of occupations and privileges is forbidden by the Amendment of 1932. The district court discussed these points, indicating that equality and uniformity under the state constitution is essentially the same requirement as equality and due process under the Fourteenth Amendment. The Act being in violation of the latter, it equally violates the state constitutional provisions (CHESNUT, R. 270, 274-275). Having disposed of the case on other grounds, and there being no interpretation of the constitutional amendment by the state court, the district court deemed it unnecessary to express a definite opinion as to appellee's point that classification and graduation of privileges is forbidden. We recognize the force of this position, and in deference thereto we have confined the argument here to the unequal and discriminatory operation of the statute, and to its inapplicability to service station operators.

We respectfully ask that the decree of the district court enjoining the payment of the tax into the state treasury and directing the repayment thereof to the appellee be affirmed.

Respectfully submitted,

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